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No. _____

# In the Supreme Court of the United States

HILL'S PET NUTRITION, INC.,
*Petitioner*,

v.

CAROL L. ISAACS,
*Respondent*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a charge timely complaining that co-worker acts contributed to a hostile work environment in violation of Title VII preserves every allegation that otherwise time-barred acts—however unrelated—contributed to that hostile environment so long as the complaining employee remained within the same "chain of command."

## PARTIES TO THE PROCEEDING

The parties in the court of appeals were Carol L. Isaacs, plaintiff-appellant, and Hill's Pet Nutrition, Inc. and Colgate-Palmolive Company, defendants-appellees. Colgate-Palmolive Company is not a petitioner because it was dismissed by the district court, and the court of appeals affirmed its dismissal.

## RULE 29.6 STATEMENT

Colgate-Palmolive Company is the parent company of Hill's Pet Nutrition, Inc., and holds 100% of the stock of Petitioner Hill's Pet Nutrition, Inc. No publicly held company holds 10% or more of Colgate-Palmolive Company's stock. Colgate-Palmolive Company has no parent company.

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## PETITION FOR A WRIT OF CERTIORARI

Hill's Pet Nutrition, Inc., respectively petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

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## OPINIONS BELOW

The opinion of the Court of Appeals (App. 3a - 9a) is printed at 485 F.3d 383. The opinion of the District Court (App. 10a - 56a) is unreported. The Court of Appeals' order denying rehearing (App. 1a - 2a) is unreported.

## JURISDICTION

The Court of Appeals issued its opinion on May 4, 2007. It denied rehearing and rehearing en banc on May 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

42 U.S.C. § 2000e-5(e)(1) provides:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or

> to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

## STATEMENT OF THE CASE

This case addresses which, if any, stale allegations of co-worker harassment may be preserved as part of a Title VII hostile work environment claim if any allegation occurs within the limitations period. In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), this Court ruled that a timely-filed charge preserved all allegations that are part of the "same actionable hostile environment" but did not adopt a rule to determine which allegations are part of that actionable environment. Despite ample time for percolation, the lower courts continue to struggle with the issue, as illustrated by the conflicts between Chief Judge Easterbrook's decision in this case and decisions in other circuits. This disarray means that the law is enforced differently in different jurisdictions and that the federal agency charged with enforcing the statute is left with ambiguous guidance.

This question is vitally important because of the number of hostile work environment claims in the federal courts. The Equal Employment Opportunity Commission receives more than 12,000 sexual harassment complaints annually, and more than 15,000 employment discrimination cases are filed in the federal courts each year, many including hostile work

environment claims.[1] Settling this question will allow some cases (including this one) to be terminated before trial and, for those cases going to trial, will instruct the lower courts which evidence is relevant to the hostile work environment claim.

*Morgan* applied, but did not adopt, three factors suggested by the Ninth Circuit to determine whether conduct is part of the same actionable harassment—the type of harassment, its frequency, and whether it occurred under the same managers. Following *Morgan*, lower courts have inconsistently applied these factors, reaching different conclusions on how much earlier incidents must resemble those incidents that occurred within the limitations period, and on what management actions can cut off liability. "*Morgan* itself does not offer precise guidance on how to evaluate whether an act that falls outside the statutory time period can nonetheless be considered for liability purposes." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1114 n.6 (9th Cir. 2004).

Moreover, under any interpretation, the rule announced by the Seventh Circuit goes well beyond the outer limits set by *Morgan*. Instead of analyzing the relatedness of co-worker conduct to determine if it was part of the same actionable harassment, the Seventh Circuit stated categorically that *all* acts while the complaining employee was under the same "chain of command" must be included in the hostile work environment, no matter how dissimilar and even if (as in this

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[1] Equal Employment Opportunity Comm'n, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2006, available at* http://www.eeoc.gov/stats/harass.html (last visited Aug. 24, 2007); Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, Table C-2 (Mar. 31, 2006), *available at* http://www.uscourts.gov/caseload2006/contents.html.

case) the employee was transferred away from prior harassers. This Court should grant the writ to clarify this important issue and eliminate the lower courts' division and confusion.

**A. Isaacs's Allegations**

Carol Isaacs contended that co-worker conduct made working conditions at Hill's Pet Nutrition's Richmond, Indiana plant intolerable for her. In her affidavit, she alleged problems in her sixty-three months of employment from 1999 to 2003, which she contends amounted to a hostile work environment based on sex.

Hill's manufactures pet food, and its Richmond operation is divided into four areas: Packaging (where Isaacs worked first), Stretchwrap (where she worked later), Dry Mix (where she worked last), and Processing. App. 12a, 14a. Isaacs alleged problems with different co-workers in each of the areas in which she worked. App. 40a - 44a.

Isaacs alleged that when she worked in Packaging, a co-worker "refused to train her unless she listened to him describe his sexual exploits and desires." App. 7a. She said he stopped training her when she insisted he stop the unwanted conversation. *Id.* Also in Packaging, she alleged frequent unwanted sexual talk and noisemaking over the common radio frequency. App. 7a - 8a.

Isaacs was moved from Packaging to Stretchwrap in an acknowledged effort to address her complaints. The record is undisputed that Isaacs agreed to this transfer, that, following the transfer, she no longer worked with the Packaging co-worker, and that the conduct she had complained about involving him stopped. Seventh Cir. Supp.

App. 15-16 (102:21-103:10, 105:16-106:12), 17 (130:25-131:7), 19 (146:11-147:16), 100 (33:11-15).

Isaacs alleged that after she was transferred to Stretchwrap, "1) She glimpsed objectionable materials on computer screens two times; 2) she frequently heard comments over the radio in Stretchwrap [where she worked] about 'dragging my wood,' or 'my wood' awful long' that she took to be sexual references." She also alleged that "3) [co-worker] Pebworth twice told her that her rear end was so big that two men could climb on it; 4) Pebworth made crying sounds over the radio in an effort to mock her, used the word 'bitch' in her presence a few times, and the term 'fucking bitch' twice in reference to someone other than Isaacs." App. 5a – 6a.

Isaacs was assigned to yet a third department—Dry Mix—after an extended leave of absence. Isaacs alleged that different employees acted angry at her and that one co-worker pulled her ears and bent her head forward and then said, "write that in your little book." Seventh Cir. App. 93-94.

Isaacs filed her first charge alleging sexual harassment on January 31, 2003. App. 26a. The charge was filed during her assignment to Stretchwrap and more than 300 days after her transfer out of Packaging. App. 29a – 30a. Isaacs never filed a charge during her employement after her transfer to Dry Mix.

Isaacs's lawsuit also alleged Title VII discrimination, Family and Medical Leave Act violations, and retaliation. The District Court granted summary judgment in Hill's favor on all Isaacs's claims, and the Seventh Circuit affirmed as to all the claims except hostile work environment. App. 55a, 8a.

**B. District Court Judgment**

After reviewing the evidence in detail, the District Court granted summary judgment to Hill's on all claims, explaining its decision in a forty-two-page order. The District Court concluded that Isaacs's allegations of conduct in Stretchwrap were not sufficiently severe or pervasive to constitute a hostile work environment when judged by an objective standard. App. 40a - 43a. The allegations of conduct in Stretchwrap were the only ones that fell within the 300-day limitations period covered by Isaacs's complaint to the Equal Employment Opportunity Commission. *See* App. 36a (Isaacs's transfer to Stretchwrap occurred in October 2001). The District Court concluded that Isaacs subjectively found the conduct to be hostile, but her sex-based allegations did not involve severe or pervasive conduct and her other allegations merely alleged inappropriate behavior that was not sex-based. App. 41a - 42a.

The District Court also rejected Isaacs's claim that certain actions that occurred outside the limitations period were part of the same alleged hostile work environment. App. 30a - 32a. These allegations all stemmed from Isaacs's time working in the Packaging portion of the plant, which was physically separate and involved an entirely different set of co-workers. App. 30a. The District Court concluded that Isaacs failed to prove any link between the acts and actors complained of in Packaging with those in Stretchwrap; rather, they "occurred under entirely different working conditions, involving completely different actors, and simply cannot be described as relating to her timely allegations." *Id.*

### C. Seventh Circuit Opinion

In an opinion by Chief Judge Easterbrook, the Seventh Circuit took a different view of the hostile work environment claim, declining to analyze separately the work environments in Stretchwrap and Packaging. The Seventh Circuit acknowledged that "[t]he [Stretchwrap and Packaging] teams have different leaders and work in different parts of the plant," but did not further analyze the working environment, co-workers, or supervisors in the two areas. App. 5a.

The Seventh Circuit instead determined that, because the employer, not employees, is held liable under Title VII, it did not matter that Isaacs was allegedly harassed by one group of co-workers in Packaging and a different group in Stretchwrap. App. 6a. The Seventh Circuit created this rule: "As long as the employee remains in the same chain of command, however, and the same people control how the employer addresses problems in the workplace, there is only one employment practice, and all events may be considered (subject to the possibility of laches) to determine whether that employment practice violates Title VII." App. 7a. The Seventh Circuit concluded that a reasonable fact finder could determine that Isaacs's allegations, if proved, constituted an actionable hostile work environment, so it reversed the District Court's summary judgment on the hostile work environment claim. *Id.*

### D. *National Railroad Passenger Corp. v. Morgan*

In *Morgan*, this Court ruled that some acts outside the filing period may be deemed part of the "whole" hostile environment claim "for the purposes of timely filing and liability." *Morgan*, 536 U.S. at 118. Accordingly, a "charge alleging a hostile work environment will not be time barred

if all acts constituting the claim *are part of the same unlawful practice* and at least one act falls within the filing period." *Id.* (emphasis added).

But *Morgan* connects hostile acts within and outside the period only if they are related. Specifically, *Morgan* left undisturbed the Ninth Circuit's approach, inquiring whether acts, "involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers" to determine whether they belonged to the same hostile environment. *Id.* at 120. Although *Morgan* acknowledged the Ninth Circuit's factors, it did not adopt them. Thus, *Morgan* left lower courts without clear guidance as to which otherwise-time-barred acts are included in a hostile work environment.[2]

## REASONS FOR GRANTING THE PETITION

The Seventh Circuit's approach goes far beyond the boundaries described in *Morgan* and adopted by other circuit courts in determining what conduct is to be included in a

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[2] *See also* Amanda J. Zaremba, Comment and Casenote, National Railroad Passenger Corp. v. Morgan: *The Filing Quandary for Legally Ill-Equipped Employees and Eternally Liable Employers*, 72 U. Cin. L. Rev. 1129, 1157 (2004) (noting that the required analysis "creates a dilemma for lower courts, which must determine exactly what evidence of time-barred acts may be taken into consideration"); Tara-Ann Topputo, Note, *In Opposition To Applying the Continuing Violation Doctrine to Hostile Work Environment Claims:* National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), 28 U. Dayton L. Rev. 449, 478-79 (2003) (noting that "the *Morgan* Court provides no guidance" as to the determination of whether acts are part of the same actionable work environment and citing practitioners' concerns).

hostile work environment claim under Title VII. Its "chain of command" rule conflicts with the application of *Morgan* by other circuits. Moreover, it expands hostile environment claims—and thus the 180-and 300-day limitations periods under Title VII—in derogation of Congress's expressed preference for the prompt and voluntary resolution of Title VII claims.

The Seventh Circuit's approach also adds to the confusion among the lower courts. In the past five years, this Court has emphasized that the charge-filing deadlines of Title VII are deliberately short and precise. *Ledbetter v. Goodyear Tire & Rubber Co.*, __ U.S. __, 127 S.Ct. 2162, 2170 (2007); *Morgan*, 536 U.S. at 101. But, as to hostile work environment claims, this Court has not clarified how a court should go about the "court's task" of "determin[ing] whether acts about which an employee complains are part of the same actionable hostile work environment practice." *Morgan*, 536 U.S. at 120.

The Court should grant certiorari to resolve this confusion and end the circuits' conflict. Without intervention, the lower courts will continue to apply disparately what should be a uniform statutory limitations scheme.

## I. THE STANDARD ADOPTED BY THE SEVENTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

### A. The Standard Announced Below Conflicts with Standards Applied by Other Courts of Appeals.

The circuits have diverged in their application of *Morgan*'s direction that "consideration of the entire scope of a hostile work environment claim, including behavior alleged

outside the statutory time period, is permissible for the purposes of assessing liability" as long as one act contributing to the alleged hostile environment occurs during the period. *Id.* at 105. Only in the Seventh Circuit is the "same chain of command" necessary or sufficient to unify disparate acts of individual co-workers into a single unlawful practice. The Seventh Circuit's categorical rule elevates continuity of management to the exclusion of any other relevant factors and thereby conflicts with the law of at least five other circuits.

1. In *Porter v. California Dep't of Corrections*, 419 F.3d 885 (9th Cir. 2005), the Ninth Circuit accepted *Morgan*'s guidance that courts should ask "whether the earlier and later events amounted to 'the same type of employment actions, occurred relatively frequently, [or] were perpetrated by the same managers.'" *Porter*, 419 F.3d at 893 (quoting *Morgan*, 536 U.S. at 120). The court examined whether allegations of acts occurring from 1995 to 2001 were part of the same hostile environment. Unlike the Seventh Circuit, the Ninth Circuit severed from the alleged "hostile-environment practice" acts alleged to have occurred outside the limitations period that were different in kind and perpetrator from timely acts.

*Porter* cannot be squared with the standard adopted by the Seventh Circuit. The severed acts in *Porter* occurred under the same supervisors and chain of command as the other acts. Under the Seventh Circuit's rationale in *Isaacs*, these acts could not have been excluded. Thus, Isaacs's case would have come out differently had it been reviewed by the Ninth Circuit. Indeed, the Ninth Circuit's approach is very similar to the District Court's in this case, which the Seventh Circuit rejected.

The Tenth Circuit has likewise applied the *Morgan* factors, and not a bright-line test, to sort stale from timely allegations of harassment. In *Duncan v. Manager, Dep't of Safety*, 397 F.3d 1300 (10th Cir. 2005), the court found that acts that were threatening rather than sex-based, that occurred during a different work assignment, and that were perpetrated by different people did not belong to "the same hostile work environment as those [largely sex-based] acts alleged during the filing period." *Id.* at 1310.[3] Nor did the court find significant that throughout the eighteen-year period spanning the plaintiff's allegations, she variously reported or could have reported her sexual harassment complaints to the same "Internal Affairs Bureau." *Duncan* thus also runs contrary to the Seventh Circuit's line-drawing. The District Court's treatment of Isaacs's claim would have been affirmed under the Tenth Circuit's approach.

The Eighth Circuit applied the *Morgan* factors in a case that was tried, *Rowe v. Hussmann Corp.*, 381 F.3d 775, 781 (8th Cir. 2004), finding that "acts before and after the limitations period were so similar in nature, frequency, and severity that they must be considered to be part and parcel of the hostile work environment that constituted the unlawful employment practice that gave rise to this action." *Id.* The court did not rely on continuity within the plaintiff's chain of command.

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[3] The untimely acts alleged involved "frequent instances of threatening physical and psychological harassment," whereas the timely acts alleged involved "off-color comments and rumor-spreading perpetrated by a completely different set of actors" and so could not be considered part of the same hostile work environment. *Id.* at 1309.

Most recently, *Vickers v. Powell*, 2007 WL 1952369, at *10 (D.C. Cir. Jul. 6, 2007), implicitly rejects the Seventh Circuit's single factor "chain of command" approach, instead applying the *Morgan* factors to determine whether alleged acts dating from 1992 to 2000 belonged to the same hostile environment. *Vickers* concluded that retirement of the manager who allegedly harassed the plaintiff was insufficient to break the continuity of her claim. Interpreting *Morgan* to sever acts bearing "no relation" to a timely claim, the District of Columbia Circuit concluded that acts spanning eight years were not, according to the court, "so obviously different in kind for us to conclude that they are not related as a matter of law." *Id.* (reversing summary judgment granted by the district court in favor of the employer). Although *Vickers* cites *Isaacs* as *confer* (*cf.*), apparently for the proposition that the employer is the proper focus in Title VII cases, *Vickers*'s analytical approach is fundamentally inconsistent with *Isaacs* because it analyzes the similarity of the older and newer allegations of hostile environment rather than relying on the bright-line "chain of command" approach. Under the Seventh Circuit's approach, the manager's retirement would have broken the "chain of command" and severed the earlier incidents, producing a different outcome.

2. By disregarding Isaacs's transfer to a different area of the plant to address her complaints of hostile conduct, the Seventh Circuit's decision conflicts with the standard applied by the Tenth and Eleventh Circuits and some district courts. In *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258-59 (11th Cir. 2003), the Eleventh Circuit held that the employer's investigation and corrective disposal of pornographic material in the workplace severed those acts from any subsequent hostile environment. The court specifically noted that, after management's action, the plaintiff had no further trouble with the employee she complained about and did not subsequently

complain again to her employer—conditions equally met in *Isaacs*—and excluded the earlier acts from the alleged hostile environment. And, unlike the Seventh Circuit's single-minded "chain of command" focus, the Eleventh Circuit looked at whether management took appropriate corrective action when it learned of problems and severed some allegations because management had acted promptly to address them. *Id.* at 1258-59.

The Tenth Circuit and other courts also have applied *Morgan* similarly to sever from a hostile work environment claim acts addressed reasonably by management. *E.g.*, *Holmes v. State of Utah*, 483 F.3d 1057, 1063 (10th Cir. 2007) (transfer cuts off liability despite one incident of harassment after transfer); *Randall v. Potter*, 366 F. Supp. 2d 120 (D. Me. 2005) (employer's investigation and disciplining co-workers cuts off liability). The Seventh Circuit, on the other hand, unified into a single hostile environment claim different working environments and ignored management's corrective action as an intervening event.

3. The circuits have expressed their confusion over how to apply the limitations rule in hostile environment cases. The Fifth Circuit has asserted that it remains unclear "whether the Supreme Court believed its enunciated standard [in *Morgan*] to be a new requirement, or whether it left the Ninth Circuit free to continue to utilize its then existing standard"—a standard that permits courts to consider acts arising from a "systematic policy or practice that took place within the limitations period" for hostile work environment claims. *Celestine v. Petroleos de Venezuela SA*, 108 Fed. Appx. 180, 187 n.9 (5th Cir. 2004). The Ninth Circuit has itself commented that *Morgan* "does not offer precise guidance" on how to determine which acts can be considered for liability. *McGinest*, 360 F.3d at 1115 n.6 (concluding *Morgan*

"implies" that a previous act would be time-barred if it "had no relation to the later acts, or there was intervening action taken by the employer").

This confusion extends to whether the continuing violation doctrine—an equitable exception to charging deadlines—survives *Morgan*.[4] *Compare Watson*, 324 F.3d at 1258 (*Morgan* "rejected the application of the continuing violation doctrine in hostile work environment cases") *with Celestine*, 108 Fed. Appx. at 187 & n.9, 10 (stating that "it is unclear whether the Supreme Court believed its enunciated standard [in *Morgan*] to be a new requirement" and "[e]ven after the Supreme Court's *Morgan* decision, this Circuit continues to apply the continuing violation doctrine to hostile work environment claims"). And while many circuits have adopted the *Morgan* factors, some read *Morgan* to unify all acts but those with "no relation" to a timely claim, *see, e.g.*, *Vickers*, 2007 WL 1952369, at *10 (also citing *Morgan* factors), while others require a stronger relationship between acts. *Compare, e.g.*, *Duncan*, 397 F.3d at 1309-10 (finding a temporal relation insufficient to aggregate acts of a different nature and committed by different people into a single employment practice).

The circuits reflect disarray as to the proper standard and method for determining whether individual acts belong to the same hostile environment claim. This division suggests no means of resolution short of intervention by this Court.

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[4] For the principle that the continuing violation doctrine is an equitable exception, see, e.g., *West v. Philadelphia Electric Co.*, 45 F.3d 744, 754 (3d Cir. 1995).

### B. The "Chain of Command" Rule Conflicts with the Apparent Intent of *Morgan* and Undercuts the Short, Precise Deadlines of Title VII.

1. The Seventh Circuit's holding that all acts of co-worker harassment are connected so long as the complaining employee remains within the same "chain of command," no matter how far separated in time, in kind, or in perpetrator, undermines both Congress's design of Title VII and appropriate incentives for employers. As this Court recognized in *Morgan* and *Ledbetter*, Congress assigned short filing deadlines to Title VII claims "to encourage the prompt processing of all charges of employment discrimination." *Ledbetter*, 127 S.Ct. at 2170.

The specified charging periods lie at the heart of Title VII's remedial scheme. To bring a Title VII lawsuit, an individual must file an EEOC charge within 180 or 300 days (depending on the state) "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-2(a)(1). As this Court has stressed, Title VII creates an "integrated, multistep enforcement procedure." *Ledbetter*, 127 S.Ct. at 2170. "[S]hort by any measure," the charging deadlines "reflect[] Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 2170-71.

*Morgan* held that some acts outside the filing period may be deemed part of the hostile environment claim, but it did not automatically join all claims, no matter when they occurred. *Morgan*, 536 U.S. at 118. *Morgan* concluded that acts within and outside the filing period must be related in order to be considered part of the same claim. *Id.* at 121. *Morgan* made clear, moreover, that constituent acts of a hostile environment must be "cumulative." *Id.* at 115. Such

acts must, under *Morgan*, be sufficiently repetitive and related to contribute to an actionable whole.

The "accumulation" requirement is critical to the remedial scheme of Title VII. *Morgan* specifically directs courts to "determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice." 536 U.S. at 121. That determination is the principal gatekeeper against stale allegations of harassment and indispensable to maintaining charging deadlines for hostile environment claims. And adherence to charging deadlines is—as this Court has repeatedly recognized—"the best guarantee of evenhanded administration of the law." *Ledbetter*, 127 S.Ct. at 2171; *Morgan*, 536 U.S. at 108 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (noting benefits of "strict adherence to the procedural requirements specified by the legislature")).

2. Ignoring *Morgan*'s intent, the Seventh Circuit has redefined the boundary of a claim based on co-worker harassment by the continuity of individuals within the complaining employee's "chain of command." The new standard is categorical: "As long as the employee remains within a single chain of command . . . and the same people control how the employer addresses problems in the workplace, there is only one employment practice, and *all* events may be considered . . . to determine whether that employment practice violates Title VII" assuming that at least one event is the subject of a timely administrative charge. *Isaacs*, 485 F.3d at 386 (emphasis added).

Most importantly, this rule conflicts with this Court's instruction that hostile environments are "the *cumulative* effect of individual acts." *Ledbetter*, 127 S.Ct. at 2175 ("[T]he actionable wrong is the environment, not the

individual acts that, taken together, create the environment"). Under *Morgan*, "individual acts" accumulate to create a hostile environment claim "for the purposes of timely filing and liability." *Id.* at 118; *see also id.* at 124 (O'Connor, J., concurring in part and dissenting in part) (noting disagreement with "the Court's conclusion that, *because of the cumulative nature of the violation*, if any conduct forming part of the violation occurs within the charge-filing period, liability can be proved and damages can be collected for the entire hostile environment" (emphasis added)).

The *Morgan* factors—which analyze whether acts within and outside the limitations period "involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers"—reflect this concern. *Id.* at 121. Each factor probes for a cumulative effect that transcends the harm of any individual act. *Id.* at 115-16 (a hostile work environment claim "cannot be said to occur on any particular day").

The Seventh Circuit jettisoned this multi-factored comparison, together with the principle of accumulation, when it defined hostile environment by sole reference to an employee's "chain of command." The individual acts need not be similar or related. Rather, a common "chain of command" will bind co-worker acts with no other connection into a single employment practice even if the acts are so different and distant they could have no cumulative effect. Acts in different locations, when the plaintiff had different duties and worked with different co-workers, could be united by dint of a common supervisor, human resources representative, or corporate manager alone. Conversely, the Seventh Circuit's ruling seems to indicate that similar acts of co-worker harassment could be severed by a change in

supervision because the complaining employee would no longer be within the same "chain of command."

Under the Seventh Circuit's rule of law, even an intervening employer action that separated a plaintiff from harassing co-workers and stopped the very acts she complained of (as occurred here) would not—despite settled law to the contrary—sever those acts from a timely claim. *Cf. Morgan*, 536 U.S. at 118 (identifying "intervening action by the employer" as an example of boundary between different hostile work environment claims); *Holmes*, 483 F.3d at 1063 (employer's reasonable intervening act cuts off liability); *Watson*, 324 F.3d at 1258-59 (same); *see also Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000) ("[T]he employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring."). Indeed, the Seventh Circuit has dispensed with every factor *Morgan* endorsed (*i.e.*, type, frequency, identity of perpetrators and employer intervention) to install a "chain of command" test *Morgan* did not mention. And the Seventh Circuit's rule of law, though categorical, adds to the confusion because it is vague and unexplained.[5]

3. Moreover, the Seventh Circuit's standard focuses exclusively on only one of the elements necessary to prove a hostile work environment claim. The elements of a hostile work environment claim are that: (1) the employee is a member of a protected class; (2) the employee was subjected to unwelcome harassment; (3) the harassment was directed at the employee because of his or her protected characteristics;

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[5] The rule will likely open a collateral area of litigation as to who exactly matters in the undefined "chain of command."

(4) the harassment was sufficiently severe and pervasive to alter the employee's working conditions; and (5) there is some basis for employer liability. *Cotton v. Cracker Barrel Old Country Store*, 434 F.3d 1227, 1231 (11th Cir. 2006). The Seventh Circuit is therefore incorrect that "[d]oing nothing after receiving multiple complaints about serious conditions is a straight road to liability under Title VII." App. 7a. "Doing nothing" satisfies only the fifth element of the test. As stated in the EEOC's enforcement guidance for employer liability for unlawful harrassment, "The question of liability arises only after there is a determination that unlawful harassment occurred."[6]

The *Morgan* factors for assessing whether otherwise-time-barred conduct is part of a hostile work environment address the allegedly hostile conduct itself and therefore relate to the remaining elements of a hostile work environment claim. The Seventh Circuit's standard distorts *Morgan* because management continuity ("chain of command") alone cannot establish liability without underlying acts, nor is management continuity alone sufficient to unite timely and time-barred acts in a single hostile environment.

## II. THIS CASE PRESENTS A RECURRING ISSUE OF VITAL IMPORTANCE.

The post-*Morgan* limitations issue presented in this case is no less important than that resolved in *Ledbetter*, 127 S.Ct. at 2169-72 (clarifying application of limitations period and

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[6] Equal Employment Opportunity Comm'n, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html.

*Morgan* to disparate pay claims). As in *Ledbetter*, the circuit conflict forces a federal agency—the EEOC—to choose between the uniform administration of a statutory scheme and obedience to the different holdings of courts in different regions, and therefore is an intolerable circuit conflict. Indeed, the EEOC receives *12,000 to 15,000* sexual harassment charges each year.[7] And a survey of decisions between November 1, 2005 and November 1, 2006, indicates that over six hundred reported federal cases during that time period addressed the issue of whether a "severe or pervasive" hostile work environment existed, an analysis inextricably bound to the determination of what conduct falls within the statutory time period for consideration.

The different limitations rules in different circuits pose an immediate dilemma for an agency that must determine how to review these charges and establish the scope of charge investigations. And, as in *Ledbetter*, the proper application of charging deadlines broadly affects the administration of Title VII claims in the lower courts. Limitations issues are often dispositive. Clarifying the factors used to determine what acts constitute a hostile environment would thus promote early resolution of, and diminish the now-frequent litigation over, limitations issues in district courts across the country.

This circuit conflict is also intolerable because it allows courts to disparately apply a uniform limitations scheme. Employers are no less entitled to protection from stale hostile

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[7] Equal Employment Opportunity Comm'n, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2006*, *available at* http://www.eeoc.gov/stats/harass.html (last visited Aug. 24, 2007).

environment claims in the Seventh Circuit than elsewhere.[8] Yet without intervention, the Seventh Circuit will now apply a rule that forgives statutory charging deadlines as to unrelated acts whenever they occur under a single chain of command. Conversely, the preservation of an employee's Title VII allegations should not depend on state of residence.

Resolution of the question presented is critical to preserving Title VII's statute of limitations. As this Court recently explained, statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Ledbetter*, 127 S.Ct. at 2170 (internal citations, quotations omitted). These goals depend, however, on the ability of lower courts to define the scope of the hostile environment. Without guidance from this Court, confusion will persist over which acts belong to a timely hostile environment claim.

## III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR REVIEW BECAUSE THE PROPER STANDARD SEVERS STALE ALLEGATIONS AND REQUIRES JUDGMENT FOR THE EMPLOYER.

This case provides an appropriate vehicle for the court to address the question presented because the proper standard severs stale allegations and requires summary judgment on Isaacs's hostile environment claim. The alleged acts falling

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[8] Though the equitable doctrine of laches may offer some protection to employers, "Congress plainly did not think that laches was sufficient in this context." *Ledbetter*, 127 S.Ct. at 2171.

outside the filing period are different in type, perpetrator, severity and frequency from those falling within it.

1. The district court properly found that Isaacs's treatment in Packaging, as to which she did not timely complain, "occurred under entirely different working conditions, involving completely different actors, and simply cannot be described as relating to her timely allegations." App. 30a. None of the *Morgan* factors—whether acts were the same type, occurred frequently, and had the same perpetrators, *Morgan*, 536 U.S. at 121—suggest these allegations should be amalgamated into a single claim. As the district court found, Isaacs could not reasonably experience her different experiences in Packaging and Stretchwrap as contributing to the same hostile environment based on sex. App. 30a.

The District Court granted summary judgment on this basis, stating (before the Seventh Circuit altered the standard) that "[s]imply remaining with the same employer does not, by itself, indicate that these actions are part of the same hostile work environment claim as her timely allegations." App. 30a. It noted that "Isaacs makes no allegation and presents no evidence linking the acts and actors complained of during her time in Packaging to her time in Stretchwrap. Accordingly, the Court will not include alleged acts" occurring before the 300-day limitations period. *Id.* The Seventh Circuit's reversal was based only on the District Court's failure to include earlier conduct in the hostile work environment. App. 6a. Adopting a rule that excludes that stale conduct would mandate affirmance of the District Court's judgment.

2. This issue frequently arises in the interlocutory context, and this case therefore presents an appropriate opportunity for review. Like most limitations issues, the

question presented is one of law. And to afford the intended protection from stale claims, the limitations period should be applied *before* rather than after trial. *See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005) (resolving statute of limitations question in interlocutory appeal). This Court, moreover, has previously addressed significant questions of Title VII liability on review of summary judgment decisions. In *Burlington Industries, Inc. v. Ellerth*, for example, the Court granted certiorari following the Seventh Circuit's reversal of summary judgment in a sexual harassment case "to assist in defining the relevant standards of employer liability." 524 U.S. 742, 751 (1998). There, as here, intervention is justified as both speeding resolution of the litigation and deciding a question of importance to employers, employees, and a federal agency alike. Significantly, most limitations issues in employment cases are addressed through pretrial motions, so the posture of this case makes it an appropriate vehicle for addressing the issue in the same procedural context in which it will recur.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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## APPENDIX A

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**CHICAGO, ILLINOIS 60604**

**No. 06-2201**

**[Filed May 29, 2007]**

CAROL L. ISAACS,
*Plaintiff-Appellant,*

v.

HILL'S PET NUTRITION, INC., and
COLGATE-PALMOLIVE COMPANY,
*Defendants-Appellees.*

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:03-cv-0348-LJMVSS
Larry J. McKinney, *Chief Judge.*

Before
Hon. FRANK H. EASTERBROOK, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. ANN CLAIRE WILLIAMS, Circuit Judge

## ORDER

Defendant-appellee Hill's Pet Nutrition, Inc. filed a petition for rehearing and rehearing en banc on May 18, 2007. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**No. 06-2201**

**[Filed May 4, 2007]**

CAROL L. ISAACS,
*Plaintiff-Appellant,*

v.

HILL'S PET NUTRITION, INC., and
COLGATE-PALMOLIVE COMPANY,
*Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:03-cv-0348-LJM-VSS
Larry J. McKinney, *Chief Judge.*

Before EASTERBROOK, *Chief Judge*, and BAUER and WILLIAMS, *Circuit Judges.*

EASTERBROOK, *Chief Judge.* Carol Isaacs worked for Hill's Pet Nutrition, packaging pet food and preparing the bags for shipment, for more than five years. In 2002 and 2003 she filed charges of sex discrimination with the EEOC, contending that her employer violated Title VII of the Civil

Rights Act of 1964. The district court granted summary judgment against Isaacs, who had sued not only Hill's but also Colgate-Palmolive, its corporate parent. As the district court remarked, Colgate was not Isaacs' employer, and she offers no reason why an investor should be liable for Hill's acts. Cf. *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). We need not mention Colgate again.

Many of Isaacs' claims in this litigation are outside the scope of the administrative filings. She complains, for example, about her discharge in 2005, but she never filed a charge concerning that event, and the charges in 2002 and 2003 could not have alerted the employer to a grievance about events yet to occur. A short interval between the charge and the complained-of events might not have impeded investigation and conciliation: if Isaacs had been fired a week after her charge, the EEOC would have learned this in the course of its investigation, but the gap was much longer and precluded any administrative inquiry. The same is true of her assertion that the firm retaliated against her for filing these charges and attempting to protect her rights. If she wanted to litigate such a theory, she had to use the administrative process first. Her other arguments likewise are well covered by the district court's opinion and need not be addressed here—all but one, that is.

A claim of a hostile work environment was presented in the 2003 charge. The Supreme Court treats a hostile work environment as one unlawful employment practice. See *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115-21, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). The employee may complain about any of the constituent acts, no matter how long ago they occurred, as long as the charge is filed within 300 days of any harassing act.

Hill's does not invoke the doctrine of laches, which curtails prejudicial delay. See *Pruitt v. Chicago*, 472 F.3d 925 (7th Cir. 2006). Instead it argues, and the district court found, that despite *Morgan* the hostile work environment that Isaacs claims to have experienced was *not* a single employment practice. Instead, the district court found, it was two practices: one that Isaacs experienced when she worked on the Packaging Team (February 2000 through October 15, 2001) and another when Isaacs worked on the Stretchwrap Team (October 15, 2001, through October 3, 2003). The Packaging Team bags the products; the Stretchwrap Team puts the bags on wooden pallets, applies plastic wrap, and loads them onto trucks for shipment. The teams have different leaders and work in different parts of the plant—though not far apart, since the Packaging Team delivers the bags to the Stretchwrap Team.

This change of job assignment means, Hill's contends, that the conditions that Isaacs experienced while with the Packaging Team may not be considered, as they occurred more than 300 days before her charge. And the conditions she experienced with the Stretchwrap Team were not severe enough to constitute a hostile working environment, the district judge concluded. The judge summarized what he understood to be Isaacs' claims about conditions on the Stretchwrap Team:

> 1) [Isaacs] glimpsed objectionable materials on computer screens two times; 2) she frequently heard comments over the radio in Stretchwrap about "dragging my wood," or "my wood's awful long" that she took to be sexual references [a *double entendre*, with the non-sexual meaning referring to the wooden pallets]; 3) Pebworth [the team leader in Stretchwrap] twice told her that her rear end was so

> big that two men could climb on it; 4) Pebworth made crying sounds over the radio in an effort to mock her, used the word "bitch" in her presence a few times, and the term "fucking bitch" twice in reference to someone other than Isaacs.

We may assume (without deciding) that, if this is all there was to it, the conditions were unpleasant but not serious or pervasive enough to violate Title VII. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); *Yuknis v. First Student, Inc.*, 481 F.3d 552 (7th Cir. 2007). But this is not all there was to it, for events during her entire employment with Hill's should have been considered.

When deciding that Isaacs experienced two distinct episodes of hostile work environment, the district court concentrated on the identities of her harassers. One group of men made life hard for her in Packaging; a different group vexed her in Stretchwrap. But why should this matter? Isaacs has not sued her co-workers; the entity responsible for complying with Title VII is the employer, of which Isaacs had just one. And employers are not vicariously responsible for misconduct in the workplace; employers are responsible for their own conduct (or omissions)—which is to say, for how they respond (or fail to respond) after receiving notice that an employee may be suffering from disparate treatment at co-workers' hands. See *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Dunn v. Washington County Hospital*, 429 F.3d 689 (7th Cir. 2005). (Isaacs does not contend that she suffered any adverse "tangible employment action,"

within the meaning of *Faragher* and *Ellerth*, or that Hill's is responsible for the conduct of a "supervisor.")

As Isaacs related events, she complained repeatedly to supervisors and management-level personnel at Hill's Pet Nutrition about how the men were treating her, and she received the same response every time: one or another variation on "grin and bear it." The employer's approach thus remained constant. Doing nothing after receiving multiple complaints about serious conditions is a straight road to liability under Title VII. See *EEOC v. Indiana Bell Telephone Co.*, 256 F.3d 516 (7th Cir. 2001) (en banc).

An employee moved from one plant to another, where a different set of managers made decisions about working conditions, might well experience different hostile environments for the purpose of *Morgan*. As long as the employee remains within a single chain of command, however, and the same people control how the employer addresses problems in the workplace, there is only one employment practice, and all events may be considered (subject to the possibility of laches) to determine whether that employment practice violates Title VII. Isaacs therefore is entitled to present for consideration her treatment throughout her employment at Hill's Pet Nutrition.

Ample evidence would allow a trier of fact to conclude that Isaacs was subjected to a pervasively hostile environment, designed by the male workers to drive women from the plant or at least express domination and control over them. Isaacs testified by deposition that her team leader in Packaging refused to train her unless she listened to him describe his sexual exploits and desires. When she told him to stop, all that stopped was the training—the sexual comments continued over the radio (workers in both Packaging and Stretchwrap

used radios, on a single frequency, to coordinate their activities) and whenever they met. The radio carried not only the talk about the men's "wood" but also moaning sounds whenever the men knew that Isaacs was listening. According to one of Isaacs' female co-workers, simulating the sounds of sex "was [the men's] favorite thing to do on the radio."

When Isaacs moved from Packaging to Stretchwrap, the two team leaders met to discuss her, and Isaacs' new superior (Pebworth) picked up where her old one left off. When she complained, Pebworth "accidentally" ran into her with a forklift, spilling 700 pounds of pet food, and remarked: "See what can happen to you, bitch." Her car was vandalized in the parking lot a few days later. Pebworth repeatedly tried to get Isaacs to join him in viewing pornography that he kept on a computer in the plant. Several women in addition to Isaacs gave evidence that men systematically made the lives of women in the plant miserable—and since the team leaders were the main offenders, other men felt no hesitation in joining this jolly good fun.

A jury could infer that working conditions for female laborers at Hill's Pet Nutrition were materially worse than the conditions for male laborers, that managers of the firm knew this, and that they did nothing because the firm deemed the men's morale more important than the women's welfare. That conclusion would be enough to support an award of damages under Title VII.

The judgment is affirmed, except with respect to the hostile-working-conditions claim. On that subject the judgment is reversed and the case remanded for trial.

A true Copy:

Teste: /s/ _____

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**TERRE HAUTE DIVISION**

**No. 1:03-cv-348-LJM-VSS**

**[Filed March 31, 2006]**

| | |
|---|---|
| CAROL L. ISAACS, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| COLGATE-PALMOLIVE COMPANY | ) |
| and HILL'S PET NUTRITION, INC., | ) |
| Defendants. | ) |
| | ) |

**ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

This cause is before the Court on Defendants,' Colgate-Palmolive Company ("Colgate") and Hill's Pet Nutrition, Inc. ("Hill's")[1] (collectively "Defendants"), Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil

[1] Otherwise known as Hill's Pet Nutrition Indiana, Inc.

Procedure and Local Rule 56.1. Plaintiff Carol L. Isaacs ("Isaacs") brought this action against her former employer pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, the Civil Rights Act of 1991, 42 U.S.C. § 1981, the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, the Landrum-Griffin Act, 28 U.S.C. § 40, and Indiana Code § 22-3-2-15. Her four-count Amended Complaint alleges gender discrimination, sexual harassment, denial of leave under the FMLA, and retaliation for complaining about sexual discrimination and harassment, requesting FMLA leave, and filing workers' compensation claims. The issues are fully briefed and ripe for ruling.

For the reasons stated herein, the Court **GRANTS** Defendants' Motion for Summary Judgment in its entirety and declines to exercise supplemental jurisdiction over remaining state law claims.[2] The Court therefore **DISMISSES without**

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[2] The Seventh Circuit has stated that where a court dismisses a federal claim and the sole basis for invoking federal jurisdiction has become nonexistent, that court should not exercise supplemental jurisdiction over remaining state law claims. *See Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294, 300 (7th Cir. 2003) (stating that if there is a dismissal of the original jurisdiction claim and only a supplemental jurisdiction claim remains, "the sole basis for invoking federal jurisdiction is nonexistent and the federal courts should not exercise supplemental jurisdiction over his remaining state law claims"); *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994) (stating that "the general rule is that, when all federal-law claims are dismissed before trial," the pendent claims should be left to the state courts). In addition, under 28 U.S.C. § 1367(c)(3), a federal district court may dismiss a plaintiff's supplemental state law claims if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The decision to dismiss supplemental claims is discretionary. *Larsen v. City of Beloit*, 130 F.3d 1278, 1286 (7th Cir. 1997).

**prejudice** Isaacs' remaining state claim, pursuant to 28 U.S.C. § 1447(c). Additionally, the Court **GRANTS** Defendants' Motion to Strike. The Court **STRIKES** the affidavits of Dewey Lakes, Larry Sheets, Teressa Toney, and Elizabeth Bright, and shall **DISREGARD** all statements in Isaacs' affidavit that are based on those submissions.

## II. BACKGROUND

The following facts are either undisputed or reflect the evidence in light most favorable to Isaacs as the party opposing summary judgment. Adverse facts established by defendants beyond reasonable dispute are necessarily included in the narrative.

### A. PLANT OPERATIONS

Hill's plant in Richmond, Indiana ("Plant"), manufactures and distributes premium dog and cat food. Zaleha Aff., ¶ 3. The Plant's production areas include Dry Mix/Bulk, Processing, Packaging, and Stretchwrap. *Id.*, ¶ 4. In Stretchwrap, stacked bags of pet food are wrapped with clear plastic and moved off the end of the production line to the warehouse or to waiting trucks. Moore Dep. at 15.

Technicians work 12-hour shifts, and during the relevant time period, four teams of Technicians (W, X, Y, and Z Teams) worked 12-hour shifts according to an established rotation schedule that provides for two weeks on days (6 a.m. to 6 p.m.) followed by two weeks on nights (6 p.m. to 6 a.m.). Isaacs Dep. at 46, 559. Each team is made up of cells that have responsibility for individual production areas. *Id.* at 46-47.

Since early 2002, Area Leaders have directly supervised teams of Technicians who work in their particular production areas. Haverkamp Dep. at 15-16. During the relevant time period, Area Leader Everett Jenkins ("Jenkins") supervised the Stretchwrap area. Jenkins Dep. at 23-24. During the relevant periods of Isaacs' employment, the Area Leaders reported to Operations Manager Darren Haverkamp ("Haverkamp"), who in turn reported to Plant Manager Cathy Zaleha ("Zaleha"). Haverkamp Dep. at 35.

An Individual Improvement Process ("IIP"), utilized by Hill's for improvement and formal discipline. Isaacs Dep. at 152. The IIP steps include Formal Coaching, Performance Agreement, Decision-Making Leave, and, finally, termination of employment. Isaacs Dep. at 153; Haverkamp Dep. at 106; Keinath Aff., ¶¶ 6-10.

## B. WORKING CONDITIONS

The Plant operates on a team concept. Isaacs Dep. at 47, 64, 284; Jenkins Dep. at 61-62. Technician teams are empowered to make certain decisions. For example, they can decide to stop production to perform quality checks or make improvements on operational procedures. Isaacs Dep. at 69; Zaleha Aff., ¶ 6. In addition to running production lines, teams are responsible for off-line tasks such as preventive maintenance and sanitation and can divvy up those day-to-day responsibilities as they see fit. Jenkins Dep. at 56-59. Technicians have no authority to place other Technicians in the formal disciplinary process, including the final stage of termination of employment, or to affect the base pay or benefits package of other Technicians. Zaleha Aff., ¶ 7; Keinath Aff., ¶¶ 10-11.

All Technicians at the Plant begin their employment at the same hourly rate of compensation, and their hourly rates increase at the same rate, subject to satisfactory performance, until they reach "parity" upon completion of two years of service. Zaleha Aff., ¶ 11. Technician compensation and benefits do not vary based on the area where the Technician works, nor do they vary based on the Technician's particular work assignment. Isaacs Dep. at 57, 61, 532; Zaleha Aff., ¶ 10.

## C. ISAACS' EMPLOYMENT HISTORY

On or about December 6, 1999, Isaacs was hired by Defendants as a Technician. Isaacs Dep. at 220, Exh. 10 at 1. Isaacs began work as a Technician on X Team - Packaging. *Id.* at 42. On October 15, 2001, Isaacs was transferred to X Team - Stretchwrap. *Id.* at 147; Vanderpool Dep. at 110-111, 117. Throughout her employment, Isaacs took a significant amount of leave under the Family Medical Leave Act ("FMLA"). *See* Def.'s Br. Supp. at 9-10; Pl.'s Br. Resp. at 22-23. Isaacs contends that she was denied due Family Medical Leave "FML" because she had to use vacation days when her grandson was born. Isaacs Vanderpool Dep. 261-62.

### 1. Complaints to Management

On February 4, 2002, Isaacs left a message for Human Resources Manager Jackie Vanderpool ("Vanderpool") because Isaacs believed she was being harassed because she had used FML time. Vanderpool Aff. ¶¶ 2, 28-30. Isaacs contends that Vanderpool would not respond to Isaacs' complaints. Isaacs Aff., ¶ 170. In January 2002, Isaacs called the discrimination hotline to complain about sexual harassment. *Id.*, ¶ 165. Isaacs also contends that Vanderpool

was "distressed," "acted mad at Isaacs," and "glared" at her because of her complaints. *Id.*, ¶¶ 169-72.

**2. The Product Hold Incident**

There are two main jobs in Stretchwrap — "one stop" and "pulling lines." Isaacs Dep. at 69. "Pulling lines" means using a forklift to pick up stretchwrapped pallets of product as they come off the end of conveyor lines and moving the pallets to the appropriate part of the warehouse or to a waiting truck. Bender Dep. at 81. Stretchwrap Technicians who are pulling lines are required to perform a visual check of the outside of a pallet of product from the lines they are pulling each hour, and every second hour they are required to do a "tear-down" by taking bags off the top layer of a pallet and inspecting those bags for defects. *Id.* at 255-56. Stretchwrap Technicians then document these quality checks by initialing "KQA Checks Sheets" that include sign-off boxes for "Bag clean — front of bag" and "Bag clean — back of bag." *Id.* at 160-61. Failure to perform these checks adequately, or falsifying documents related to these checks, may result in disciplinary action. Zaleha Aff., ¶ 15. Hill's may put product "on hold" if it is substandard in formula or packaging. Isaacs Dep. at 156.

On May 31, 2002, Isaacs was on shift from 6 p.m. to 6 a.m. Jenkins Dep. at 93-94, 96-97. At approximately 6 a.m. on Saturday, June 1, 2002, Technician Steve Baker ("Baker") relieved Isaacs. *Id.* Hill's asserts that Baker, upon performing his first quality check, reported to Jenkins that he found defects on bags coming off the line, *id.* at 93-95, but Isaacs had not reported any such problems to Jenkins and had signed all the hourly quality checks except for one check. *Id.* at 92. Jenkins concluded that the defects started appearing during

Isaacs' shift when she was responsible for the quality control function. *Id.* at 84, 96-97.

When Isaacs came back on duty the evening of Saturday, June 1, 2002, Jenkins told Isaacs that her team had a product hold during her previous shift. Isaacs Dep. at 156. Isaacs told management she "may have missed a few [quality] checks." *Id.* at 600; Exh. 13. Management concluded that Isaacs had admitted she signed off as having performed checks that she did not physically perform. *Id.* at 259, 599-600; Jenkins Dep. at 83; Vanderpool Dep. at 257, Exh. 11.

Isaacs presents a different version of the events. She contends that there was no problem with the quality checks until approximately 10 a.m. on Saturday, June 1, 2002, that she had reported to Jenkins that Chuck McConnell ("McConnell") was not doing his quality checks, and that Jenkins did not actually investigate from where and when the defects started appearing. Pl.'s Br. Resp. at 28-29. She contends that it was actually McConnell, a male employee, who was not performing his quality checks, and Jenkins inappropriately blamed Isaacs for the product hold. *Id.* at 30.

As a result of the product hold, Isaacs was placed Formal Coaching, the first IIP step, and, as a result, she lost half of her "Quality Pays" bonus for the quarter, which translated into a loss of approximately $122.00 Isaacs Dep. at 154; Zaleha Aff. ¶ 30. Isaacs complained to a number of managers about the Formal Coaching. *See, e.g.*, Haverkamp Dep. 81, 83; Jenkins Dep. at 78-79; Vanderpool Dep. at 250; Zaleha Aff. ¶¶ 31-32. She also asserts that as a result of being wrongly placed into IIP, she had to take stress leave. *Id.* at 34.

### 3. The Pallet Incident

On either November 12t or 13, 2002, Stretchwrap Technician Bill Pebworth ("Pebworth") knocked a pallet of product off Isaacs' parked forklift. Isaacs Dep. at 457. The product landed at her feet and she had to step back. *Id.* Pebworth looked at her and said, "See what can happen to you, bitch?" Isaacs Dep. at 461. Pebworth offered to help clean up, but Isaacs believes he was smirking. *Id.* Haverkamp and Zaleha spoke with Isaacs on her next work shift to ask about the incident. Haverkamp concluded that the incident was an accident. Haverkamp Dep. at 62. Isaacs asserts that the conclusion was reached in an attempt to cover up the incident. *See* Pl.'s Br. Resp. at 43.

### 4. Vandalism Claim

In December 2002, Isaacs reported to Havenkamp that in the early morning of November 16, 2002, she found that her car hood had been scratched in the Plant parking lot, that her license plate had been torn from its bolts, and that when she went to her car that night the parking lot lights went off for about two minutes before coming back on. Isaacs Dep. at 448-49.

### 5. Other Complaints

On January 25, 2003, Technician Chris Penland ("Penland") called Isaacs at home and rudely asked Isaacs' husband why she was not at work. Pl.'s Interrog. No. 4. Twice thereafter, Isaacs received hang-up calls from the Plant telephone number. *Id.* She also received a voice mail message from the Plant number in which dial tones were pressed but no one spoke. *Id.* Isaacs also complains that Pebworth made

crying sounds on the radio in an effort to mock her. Isaacs Dep. At 244-45.

**6. Claims Concerning Sexual Conduct**

In May or June 2002, Isaacs viewed a cartoon on a computer being used by Pebworth of a cartoon frog with a long tongue that appeared as if it might be performing oral sex. Isaacs Dep. at 497. However, Isaacs did not see the entire image, but rather, only a glimpse of it. *Id.* at 499. Some time between March and June 2002, on a public computer, Isaacs viewed a blacked-out photo of a Chinese girl that looked as though she was performing oral sex. *Id.* at 498. The image contained no nudity. *Id.* at 500. When the blacked-out portion of the photograph was removed, it revealed a picture of a woman eating chicken noodle soup. *Id.* at 159.

Hill's policy is that computers at the Plant are intended for work-related use. Zaleha Aff., ¶ 26. In the spring of 2002, an employee of the Hill's information technology department reported that, while performing unrelated work on the computer system, he had discovered some inappropriate material on the Plant's computers. Vanderpool Dep. at 166-67. Eleven employees were suspended for two weeks without pay and were placed in the disciplinary process for inappropriate use of Plant computers. Zaleha Aff., ¶¶ 24-25. Management also issued a statement to employees reminding them not to use e-mail in an inappropriate manner. Vanderpool Dep. at 176.

On February 21, 2003, Isaacs submitted a letter to management complaining that she had been sexually harassed by Pebworth, Penland, and Technician Ben Chasteen ("Chasteen") prior to November 2002. Dillard Aff., ¶ 3; Vanderpool Aff. ¶ 21. Abbie Dillard ("Dillard"), Associate

Employee Relations Manager at Hill's corporate office, wrote to Isaacs to get more information about the sexual harassment complaints. Dillard Aff., ¶¶ 2-4. Hill's investigated her complaint and concluded that Pebworth made an inappropriate comment regarding Isaacs (that her butt was big enough for two men to climb on), and he was given an Formal Coaching in which he was reminded of Hill's expectations regarding workplace behavior. Keinath Aff., ¶ 44. Isaacs also claims that Pebworth made crying sounds on the radio in an effort to mock her and regularly called women "bitches" and "fucking bitches." Isaacs Dep. at 244-45.

Additionally, Pebworth, Penland, and Chasteen would frequently make comments over the radio, "Oh, yeah, I'm dragging my wood," and "My wood's awful long." *Id.* at 509. Isaacs claims that those employees would also make noises over the radio as though they were sexually aroused. *Id.* at 81-82. In Stretchwrap, wooden pallets are sometimes used for stacking and moving bags of pet food. Moore Dep. at 158-59. The comments about wood were playing off the fact that Technicians switched between bags of product by using wood pallets. Bender Dep. at 168.

## D. ISAACS' AGENCY COMPLAINTS

On July 31, 2002, Isaacs complained to the Department of Labor ("DOL") about a variety of concerns, among other things, that Hill's counted FML against bonuses, but the DOL found no violations. In October 2002, Isaacs filed nine complaints against Hill's with the Indiana Occupational Safety and Health Administration ("IOSHA"). IOSHA found two non-serious violations upon investigation — relating to information recorded in an OSHA log, and that locks were not stamped with individual Technician identification numbers. Zaleha Aff., ¶ 52, Exh. 6. In July 2002, Isaacs filed

her first Charge of Discrimination ("Charge") against Hill's with the Equal Employment Opportunity Commission ("EEOC"), claiming sex discrimination and retaliation in the form of her Formal Coaching for the product hold. Zaleha Aff, ¶ 49, Exh. 4). On January 16, 2003, the EEOC issued a "no cause" letter dismissing Isaacs' first Charge. Zaleha Aff., ¶ 50, Exh. 5. On January 31, 2003, Isaacs filed a second Charge with the EEOC against Colgate-Palmolive Company, alleging race and sex discrimination, as well as sexual harassment and retaliation. Zaleha Aff., ¶ 53, Exh. 7. On July 31, 2003, the EEOC issued a "no cause" letter dismissing her second Charge. Zaleha Aff., ¶ 54, Exh. 8.

## III. SUMMARY JUDGMENT STANDARD

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). *See also United Ass'n of Black Landscapers v. City of Milwaukee,* 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied,* 111 S.Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest

upon the pleadings but must instead submit evidentiary materials that "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v.*

*Schafer,* 969 F.2d 278, 281(7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied,* 519 U.S. 1115 (1997).

On certain occasions, the Seventh Circuit has suggested that a court approach a motion for summary judgment in an employment discrimination case with a particular degree of caution. *See e.g., Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989). The language implied that summary judgment might be less appropriate in this context based upon the presence of issues of motive and intent. *Holland,* 883 F.2d at 1312. As the Seventh Circuit has emphasized, however, these cases do not establish a heightened summary judgment standard for employment-related cases. Instead, the language from the prior cases simply means "that courts should be careful in a discrimination case as in any case not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be." *Wallace v. SMC Pneumatics,* Inc., 103 F.3d 1394, 1396 (7th Cir. 1997). Even when discriminatory intent is at issue, summary judgment is appropriate when the nonmovant presents no evidence to indicate motive or intent in support of her position. *See Holland,* 883 F.2d at 1312. Further, the nonmovant will not defeat summary judgment merely by pointing to self-serving allegations without evidentiary support. *See Cliff v. Bd. of Sch. Comm'rs,* 42 F.3d 403, 408 (7th Cir. 1994).

## IV. DISCUSSION

### A. HILL'S MOTION TO STRIKE

When ruling on a motion for summary judgment, the Court has the authority to strike any affidavit that does not conform to the requirements of the Federal Rules of Civil Procedure. *See Adusumilli v. City of Chi.*, 164 F.3d 353, 359 (7th Cir. 1998). Hill's moved to strike certain affidavits filed by Isaacs in support of her response brief. *See* Dkt. No. 157. Isaacs relies heavily on those affidavits in her response opposing Hill's motion for summary judgment. *See* Pl.'s Br. Resp. at 4, 6-10, 13-16, 18-22, 29, 32, 43, 49-50, 57-58, 61-63, 71, 73, 76, 80-81, 85, 91-92, 94.

On the date Isaacs' surreply to Hill's motion for summary judgment and response to Hill's motion to strike were due, Isaacs moved for a fourth extension of time, which was denied by Magistrate Judge V. Sue Shields. *See* Dkt. Nos. 165, 167, 169, 170. As the Court recently explained in its Order on Isaacs' motion for reconsideration regarding Order on motion for leave to file, Isaacs' eleventh hour motion for an enlargement of time to file her surreply and response was unacceptable. *See* Dkt. No. 190 at 2-3. By failing to make a timely request for an extension, she permitted the critical date to come and go, and Judge Shields was well within her discretion to deny the motion for enlargement of time, especially considering Isaacs' extensive history of such requests. *Id.*

For failure to timely reply, Hill's motion is **GRANTED** in its entirety. The affidavits of Dewey Lakes, Larry Sheets, Teressa Toney, and Elizabeth Bright shall be **STRICKEN** from the record. Further, the Court shall **DISREGARD** all

statements in Isaacs' affidavit that are based on those submissions.

## B. COLGATE-PALMOLIVE IS DISMISSED

There were three ways in which Colgate could be found to be a proper Title VII defendant: (1) if Isaacs could present evidence that Colgate maintained an employment relationship with Isaacs; (2) if Isaacs could pierce the corporate veil and present evidence that Hill's is only an alter ego of Colgate; or (3) if Isaacs could present evidence that Colgate took actions to avoid liability under the discrimination laws or might have directed the discriminatory act, practice, or policy of which Isaacs complains. *Worth v. Tyer*, 276 F.3d 249, 259-60 (7th Cir. 2001). Isaacs fails to address this standard.

Colgate is not a proper defendant in this case because it was not Isaacs' employer. Isaacs' bare citations to twenty-two various affidavit paragraphs and deposition excerpts are not supported by argument as to how the law applies to the information in these citations, providing as an excuse, only that she did so for "the sake of brevity."[3] The Court has no obligation to develop Isaacs' arguments for her, and a single sentence not developed into a cognizable argument is treated as a waiver. *See, e.g., Tenney v. Zurek*, 168 F.3d 328, 330 (7th Cir. 1999); *Border v. City of Crystal Lake*, 75 F.3d 270, 274 (7th Cir. 1996).[4]

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[3] Ironically, this statement appears on page 95 of Isaacs' response. Pl.'s Br. Resp. at 95.

[4] Additionally, Judge Hamilton, in *Brown v. Colgate-Palmolive Co.*, Case No. 1:04-cv-782-DFH-WTL, and *Bright v. Colgate Palmolive Co.*, Case No. 1:03-cv-1709-DFH-TAB, related cases in

Accordingly, Defendants are entitled to summary judgment on this issue and Colgate is **DISMISSED** as a defendant.

## C. TIME BARRED INCIDENTS

Indiana, which is a deferral state, requires that in order to pursue a Title VII claim in federal court, a plaintiff must first file a charge of discrimination with the EEOC within 300 days from the date of the alleged discriminatory action. *Doe v. R.R. Donnelly & Sons Co.*, 42 F.3d 439, 445 (7th Cir. 1994). As a general rule, a Title VII plaintiff generally cannot bring claims in a lawsuit that were not included in her EEOC charge. *Cheek v. Western & S. Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1110-1112 (7th Cir. 1992) ("An aggrieved employee may not complain to the EEOC of only certain instances of discrimination, and then seek judicial relief for different instances of discrimination"). As the Seventh Circuit further explained in *Cheek:*

> This rule serves the dual purpose of affording the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion, and of giving the employee some warning of the conduct about which the employee is aggrieved. Although the rule is not jurisdictional, it is a condition precedent with which Title VII plaintiffs must comply. For allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would frustrate the EEOC's investigatory and conciliatory

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which employees of Hill's brought claims similar to Isaacs', has twice found that Colgate is not a proper defendant.

> role, as well as deprive the charged party of notice of the charge.

31 F.3d at 500.

Isaacs filed her first Charge on July 19, 2002. The discriminatory and retaliatory acts complained of included only her June 2002 Formal Coaching, a part of her IIP. Zaleha Aff., ¶ 49, Exh. 4. The Charge focused exclusively on the allegedly false product hold. It stated, in its entirety:

> I have been employed by Hills [sic] Pet Nutrition since about December 6, 1999. I work as a Tech in the Stretch Wrap Department. On or about June 5, 2002, I was placed on an individual improved plan (IIP) for a "hold" wrongly attributed to me. The two men with whom I was working were not disciplined or put on an IIP. . . . I believe that I was disciplined because of my sex, female, and in retaliation for previous complaints I've made about employment discrimination, in violation of Title VII of the 1964 Civil Rights Act, as amended.

*Id.* at 2. The 300-day limitations period for this Charge extends back to September 22, 2001. Isaacs' second Charge, alleging sex and race/color discrimination, harassment, and retaliation was filed on January 31, 2003. Zaleha Aff., ¶ 53, Exh. 7. The 300-day limitations period for this charge extends back to April 5, 2002.

Isaacs argues that 1) her unarticulated sexual harassment claims were embodied in her first charge regarding the IIP because the "EEOC charge stated sex discrimination, and sexual harassment is included in sex discrimination;" 2) she wrote a letter to an EEOC employee in which she complained

about sexually harassing statements which expanded the scope of her charge; and 3) that incidents outside the 300-day limitations period should be considered by the Court.

Isaacs' first argument, that sexual harassment is "included in sex discrimination" cannot be accurately described as an attempt to apply the standard applied in this jurisdiction. An EEOC charge will be held to encompass the Title VII claims asserted in a civil action if the claims are "like or reasonably related to the allegations of the charge" and "can reasonably be expected to grow out of an EEOC investigation of the allegations in the charge." *Id.* (internal quotations omitted). "When an EEOC charge alleges a particular theory of discrimination, allegations of a different type of discrimination in a subsequent complaint are not reasonably related to them unless the allegations in the complaint can be reasonably inferred from the facts alleged in the charge." *Risk v. Ford Motor Co.*, 48 F. Supp. 2d 1135, 1145 (S.D. Ind. 1999). *See also Cheek*, 31 F.3d at 503. At a minimum, the complaint and the EEOC charge must "describe the same conduct and implicate the same individuals." *Cheek*, 31 F.3d at 501. By simple virtue of the fact that sexual harassment is a form of sexual discrimination does not carry the day.

Regarding Isaacs' second argument, a supplemental letter cannot expand the scope of an EEOC charge. *Cheek*, 31 F.3d at 502-03 (sixteen-page letter could not expand the scope of charge: "pursuant to 29 C.F.R. § 1601.12(b), these additional allegations cannot expand the scope of the allegations in Cheek's original charge; they only may 'clarify or amplify' the allegations in the charge."). *See also Sitar v. Indiana Dep't. of Transp.*, 344 F.3d 720, 727 (7th Cir. 2003) (refusing to expand scope of claims beyond EEOC charge of retaliatory discharge despite knowledge of both employer and EEOC of an earlier internal complaint of sex discrimination).

Isaacs' final argument has some merit, but only with regard to her sexual harassment claim. Although Isaacs' First Amended Complaint does not include a hostile work environment Count, it is clear from Hill's filings that they interpreted her sexual harassment claims as such. *See* Def.'s Br. Rep. At 27-36. Accordingly, the Court applies hostile work environment claim standards with regard to the evidentiary limitations imposed.

Hostile work environment claims must be treated differently than other Title VII claims. *Nat. R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 115 (2002) (stating "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct."). Not only does a hostile work environment inherently involve "repeated conduct," but also hostile work environment is an unlawful employment practice that "cannot be said to occur on any particular day." *Id.* A hostile work environment occurs over time, sometimes even years. *Id.* Generally, the discrete acts which compose a hostile work environment are not individually actionable. *Id.* (citing *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993) (quoting *Mentor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986)). Thus, it can be said that a hostile work environment is really the cumulative effect of many small acts, which standing alone are not actionable under Title VII. *Id.*

A plaintiff, according to the Supreme Court, is required to file within 180 or 300 days "[a]fter the alleged unlawful employment practice occurred." *Id.* at 117. A hostile work environment is *one* unlawful employment practice. *Id.* (emphasis added). The fact that some of the "component acts" fall outside the 300 days is of no consequence to the determination of whether the component act, falling outside of the relevant period, should be considered. *Id.* Therefore,

"[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.*

Viewing the evidence in a light reasonably favorable to Isaacs, she has identified acts that a reasonable jury could conclude contributed to her claim and occurred within the limitations period. As approved by *Morgan,* the Court also will consider conduct prior to April 5, 2002, that was part of the same alleged hostile work environment.[5]

However, as Hill's points out, Isaacs also attempts to assert her claim on allegations relating to the earlier years of her employment. The Court must determine whether "the acts about which [Isaacs] complains are part of the same actionable hostile work environment practice. . . ." *Morgan,* 536 U.S. at 117. Many allegations upon which Isaacs seeks to rely pertain primarily to the behavior of co-workers in Packaging. But there is no dispute that Isaacs worked in

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[5] In the instant case, Isaacs makes no claim as to a continuing violation. Therefore, Hill's argument based upon continuing violation is specious and unavailing. Hill's claim that Isaacs is unable to use component acts that occurred prior to the 300 days prior to filing her EEOC Charge because the component acts do not create a continuing violation of the type contemplated prior to Morgan is true. However, a hostile work environment is not a continuing violation; it is a single violation which happens as long as the cumulative effect of the component parts creates such an environment. So Isaacs does not need to even address the continuing violation doctrine, as it is never implicated with regard to an alleged hostile work environment. The continuing violation doctrine has no application here and thus should not have brought it into the argument.

Packaging only from January 3, 2000, to October 15, 2001, and that following her transfer to Stretchwrap in October, 2001, she had different job duties, different co-workers, and worked in an entirely different area of the Plant. *See* Isaacs Dep. at 69, 74; Isaacs Dep. at 30, 43, 44. Simply remaining with the same employer does not, by itself, indicate that these actions are part of the same hostile work environment claim as her timely allegations. Isaacs makes no allegation and presents no evidence linking the acts and actors complained of during her time in Packaging to her time in Stretchwrap. Accordingly, the Court will not include alleged acts occurring before October 15, 2001. Those acts occurred under entirely different working conditions, involving completely different actors, and simply cannot be described as related to her timely allegations.

With regard to conduct that allegedly took place after Isaacs filed her second Charge, Hill's asserts that she failed to exhaust her administrative remedies and that any allegations that post-date her January 31, 2003, second Charge are barred. At the outset, the Court notes that this argument is not applicable to acts related to Isaacs' sexual harassment claim, as it is a single violation of cumulative effect. However, Isaacs impermissibly attempts to draw into her case allegedly retaliatory and discriminatory events that occurred well after the EEOC's opportunity to investigate her second Charge, including an alleged termination in August 2003; her working conditions; the circumstances of another leave of absence taken commencing January 30, 2004; and the administrative termination of her employment in March 2005, after months of unauthorized leave.

Although Hill's raised this issue in its reply, Isaacs' inability to respond proves inapposite. As discussed above, a plaintiff must file a charge with the EEOC before pursuing a

Title VII claim in federal court. An exception to this general rule, which allows a claim not included in the EEOC complaint to be pursued in federal court, exists when that subsequent claim is "reasonably related" to the claim that was included in the EEOC charge and if it can be expected to develop from an investigation into the charges actually raised. *Cheek,* 31 F.3d at 500; *Stevens v. Ill. Dep't of Trans.*, 210 F.3d 732, 736 (7th Cir. 2000); *Green v. Nat'l Steel Corp., Midwest Div.*, 197 F.3d 894, 897 (7th Cir. 1999).

On July 31, 2003, the EEOC investigation as to Isaacs second Charge was concluded and she received a Dismissal and Notice of Rights. Any allegation subsequent to that date, including her alleged August 2003 and March 2005 terminations, regardless of whether they were reasonably related to the acts included in her second Charge, could not be expected to develop from the EEOC's investigation, as it had concluded. Those allegations post-dating the EEOC's investigation have never been the subject of a charge, and they have not been added to Isaacs' Complaint. In fact, some events, in particular Isaacs' 2005 termination, had not even occurred when Hill's filed its Motion for Summary Judgment on September 28, 2004. Those acts allegedly occurring after July 31, 2003, are not part of this case, as Isaacs has failed to exhaust her administrative remedies. Therefore, the Court will not address them.

In sum, the Court will consider conduct that was part of the same alleged hostile work environment resulting from sexual harassment, except for those acts occurring before October 15, 2001. Isaacs' allegations of Title VII discrimination and retaliation pre-dating April 5, 2002, are time-barred and must be dismissed on that basis, and allegations post-dating January 31, 2005, shall not be considered for failure to exhaust administrative remedies. *See*

42 U.S.C. § 12117(a); *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000) ("[T]he failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement."). Therefore, the Court will not address Isaacs' time-barred allegations in its analysis.

## D. TITLE VII SEX DISCRIMINATION CLAIMS

### 1. Disparate Treatment Claim

Isaacs claims that Hill's discriminated against her on the basis of sex in the terms and conditions of her employment in a variety of ways. Title VII makes it unlawful to: "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Isaacs offers no direct evidence of discriminatory intent on the part of Hill's. To establish a *prima facie* case of sex discrimination under the indirect method of proof, Isaacs must show: (1) she was a member of a protected class; (2) she was meeting her employer's legitimate performance expectations; (3) she was subjected to an adverse employment action; and (4) she was treated less favorably than similarly-situated male employees. *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). If Isaacs can establish *a prima facie* case, Hill's must articulate a legitimate, non-discriminatory reason for its actions, and Isaacs must then respond by showing that Hill's' reason is really a pretext for discrimination. *Rhodes*, 359 F.3d at 504.

Hill's first argues that despite Isaacs' plethora of complaints, she has not suffered an adverse action. Adverse employment actions do not include inconveniences or minor events that make an employee unhappy. *See, e.g., Twisdale v. Snow,* 325 F.3d 950, 953 (7th Cir. 2003) (concluding that Title VII does not protect the hypersensitive employee "from the irritations endemic to the employment relation"). An adverse employment action is a material change such as termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or significantly diminished responsibilities. *Rabinovitz v. Pena,* 89 F.3d 482, 488 (7th Cir. 1996) (citing *Grady v. Liberty Nat'l Bank & Trust Co.,* 933 F.2d 132, 136 (7th Cir. 1993)). Not everything that makes an employee unhappy qualifies as a materially adverse action, and adverse employment actions are typically economic injuries. *Whittaker v. N. Ill. Univ.,* 424 F.3d 640, 647 (7th Cir. 2005). The Court will address each of Isaacs' complaints in turn.

**a. IIP — Formal Coaching**

Subjecting Isaacs to Formal Coaching alone does not constitute an adverse employment action. A reprimand, even if unfairly based on conduct in which the plaintiff did not engage or for which she should have not been responsible, is not an adverse action absent a material job consequence. *Lucas v. Chi. Transit Authority,* 367 F.3d 714, 731 (7th Cir. 2004); *Sweeny v. West,* 149 F.3d 550, 556 (7th Cir. 1998); *Williams v. Bristol-Myers Squibb Co.,* 85 F.3d 270, 272-74 (7th Cir. 1996) (placement of employee in performance coaching program coupled with warning that failure to improve performance may lead to further disciplinary action did not constitute adverse employment action, even when

coupled with transfer that had a "minor and indirect effect" on the employee's commission).

Isaacs points out that because she was in Formal Coaching, she lost half of a quarterly contingent bonus. For that quarter, the loss amounted to approximately $122.00 A loss of benefits must be material. *See Hildebrandt v. Ill. Dep't of Human Res.*, 347 F.3d 1014, 1033 n. 13 (7th Cir. 2003). "To be actionable, there must be a . . . decision causing *a significant* change in benefits." *Stutler v. Ill. Dep. 't of Corr.*, 263 F.3d 698, 703 (7th Cir. 2001) (citations omitted) (emphasis added). A $122 loss, especially in light of Isaacs' total compensation for the year, estimated as in excess of $50,000, does not meet this standard, and is negligible at best. *See Rhodes*, 359 F.3d at 505 (counting last day of work as absence without pay allegedly contrary to public policy was not materially adverse employment action because it had only a "negligible impact" on income and did not cause material harm).

Isaacs asserts that she also lost a "year-end bonus," but provides no detail as to the amount of that bonus nor whether it was discretionary. *See* Pl.'s Br. Resp. at 33-34. The Seventh Circuit has repeatedly held that "even the denial of a monetary perk, such as a bonus or reimbursement of certain expenses, does not constitute an adverse employment action if it is wholly within the employer's discretion to grant or deny and is not a component of the employee's salary." *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969, 972 (7th Cir. 2001) (citing *Rabinovitz v. Pena*, 89 F.3d 482, 488-489 (7th Cir. 1996) and *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 602-03 (7th Cir. 2001)).

Isaacs cites a number of cases (without actually applying the standards contained therein), to support her claim that

"evaluations which have an effect on the employee's career are adverse actions." Pl.'s Br. Resp. at 69. However, none of those cases supports the proposition that Isaacs' Formal Coaching constituted an adverse action. In *Lucas,* the Seventh Circuit noted:

> Our past decisions indicate that a negative evaluation or admonishment by an employer does not rise to the level of an adverse employment act. There must be some tangible job consequence accompanying the reprimand to rise to the level of a material adverse employment action; otherwise every reprimand to attempt to counsel an employee could form the basis of a federal suit.

367 F.3d at 731.

Applying this standard, the Formal Coaching was merely the first step of a four-step progressive discipline process. True, oral and written reprimands that, with hindsight, may have brought a plaintiff closer to termination are nonetheless adverse actions. *See Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 613 (7th Cir. 2001). However, Isaacs has failed to proffer evidence that the Formal Coaching had any impact on Isaac's employment or career prospects — much less a material impact. *Patt v. Family Health Sys., Inc.*, 280 F.3d 749, 753-54 (7th Cir, 2002) (affirming summary judgment where plaintiff failed to show how complained-of actions limited her career opportunities). There is simply no evidence that the later acts complained of were related in any way to the progressive discipline system or her Formal Coaching.

Isaacs suggests that the Formal Coaching constitutes an adverse action because it caused her to take stress leave. Pl.'s Br. Resp. at 70. But the legal standard for determining

whether an employment decision is materially adverse does not depend on the employee's subjective reaction to it. "The adversity of an employment action is judged objectively. . . ." *Cullom v. Brown,* 209 F.3d 1035, 1041 (7th Cir. 2000). The decision at issue must impact her employment status in some significant, objective way. There is no evidence of such impact here.

**b. Transfer**

Isaacs complains that on October 15, 2001, she, rather than a male co-worker, was transferred from Packaging to Stretchwrap in October 2001. Such a move constitutes a purely lateral transfer and as such does not amount to adverse employment action:

> Obviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. . . . Otherwise, every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial.

*Williams,* 85 F.3d at 274 (internal citations omitted). *See also Stutler v. Ill. Dep't of Corr.,* 263 F.3d 698, 702 (7th Cir. 2001); *Hill v. Am. Gen. Fin., Inc.,* 218 F.3d 639, 645 (7th Cir. 2000); *Place v. Abbott Labs,* 215 F.3d 803, 810 (7th Cir. 2000) ("[B]eing shifted to an essentially equivalent job that

[the plaintiff] did not happen to like as much does not a Title VII claim create"). It is undisputed that Isaacs' terms and conditions of employment have been consistent with those of other Plant Technicians in all significant respects. During the relevant time frame, she has never been suspended, demoted, or discharged. Vanderpool Aff, ¶ 15; Keinath Aff., ¶ 14. Her compensation rate and benefit package were the same as other Technicians. Zaleha Aff., ¶ 11; Vanderpool Aff., ¶ 16; Keinath Aff., ¶ 15. She worked in the same production environment and has the same shift schedule as other Technicians. Isaacs Dep. at 58-60; Vanderpool Dep. at 184:23-25, 185:1-4; Zaleha Aff., ¶¶ 10-12. Accordingly, her transfer to Stretchwrap does not constitute an adverse employment action.

**c. Training**

Isaacs claims that she was taken off a training schedule in November 2002. Isaacs also makes general claims as to her time in Stretchwrap that she did not receive a mentor or sufficient training. To demonstrate a discriminatory failure to train, Isaacs must show that 1) she is a member of a protected class; 2) her employer provided training; 3) she was eligible for training; and 4) she was not provided training under circumstances, giving rise to an inference of discrimination, i.e., similarly-situated male employees were given such raining. *See Malacara v. City of Madison,* 224 F.3d 727, 729 (7th Cir. 2000). Isaacs does not even attempt to satisfy this legal standard in her response. Isaacs has filed to show that she was eligible for the training or that it had any impact on her employment. *See Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 528-29 (7th Cir. 2003) (denial of training is not an adverse action if it has no tangible, negative impact on employment) (citation omitted). Accordingly, her "failure to

train" claims do not constitute an adverse employment action for Title VII purposes.

**d. Job Assignment**

Isaacs' complaints about disparities in work assignments are generally vague, and she often fails to identify the time period or area to which her claims relate. Specifically, she claims that men did the preventive maintenance, would not give women keys to toolboxes, and told the women to clean. *See* Pl.'s Br. Resp. at 75. However, Isaacs' allegations are inconsistent with her own deposition testimony. When asked to describe the different jobs in Stretchwrap, Isaacs testified as follows: "Q: how many different jobs were there to do in Stretchwrap? A: Well, you could pull the lines, you could do one-stop. Those two jobs are the main jobs. There may have been other jobs, but those are the two main jobs." Isaacs Dep. at 69. By her own admission, cleaning and preventive maintenance were merely ancillary tasks to the main responsibilities in Stretchwrap, and their allocation could hardly qualify as job segregation. "Undesirable" tasks and insignificant duties not commensurate with grade level or an overabundance of work, "while unfortunate, [do not rise] to the level of an ultimate employment action. It is well established that undesirable work assignments are not adverse employment actions." *Eugene v. Rumsfeld,* 168 F. Supp. 2d 655, 671-72 (S.D. Tex. 2001) (internal quotation and citation omitted)).

Technician compensation and benefits did not vary by work area or work assignment, and Technicians were expected to (and did) work in all areas of the plant. *See Rhodes,* 359 F.3d at 505 (affirming summary judgment on finding of no materially-adverse employment action under Title VII where plaintiff complained of assignments and tasks

consistent with the job duties of her position); *O'Neal v. City of Chi.*, 392 F.3d 909, 913 (7th Cir. 2004) (lateral transfer resulting in assignment of responsibilities that within the reasonable scope of plaintiff's duties did not constitute adverse employment action under Title VII). Her preference to perform some, but not other, technician tasks does not establish an adverse employment action under Title VII. *See, e.g., Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) (plaintiff must show some change in the terms or conditions of employment that is more than a "mere subjective preference."). The acts alleged do not rise to the level of adverse employment actions under Title VII.

**e. Snubs and Misbehavior by Other Technicians**

Isaacs alleges a number of snubs and misbehavior by other technicians. However, these complaints are inappropriately identified by Isaacs as supporting her disparate impact claim. Instead, they will be considered by the Court under her sexual harassment claim. Isaacs herself characterizes these alleged acts as "part of the harassment and retaliatory harassment by the male employees." Pl.'s Br. Resp. at 77. The same is true for Isaacs' claims regarding vandalism to her vehicle and an incident in which Pebworth knocked some product off of Isaacs' parked forklift.

**f. In Conclusion**

Despite Isaacs' plethora of complaints, she has failed to identify a single action within the relevant time period which constitutes an adverse employment action. Accordingly, her disparate impact claim under Title VII fails.

## 2. Sexual Harassment / Hostile Work Environment Claim

Another way in which an employer can discriminate with respect to terms and conditions of employment is by subjecting an employee to a hostile work environment based on her sex. Title VII prohibits an employer from "requiring people to work in a discriminatorily hostile or abusive environment." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 975 (7th Cir. 2004) (internal quotations omitted). An employer also can discriminate with respect to terms and conditions of employment by subjecting an employee to an adverse employment action because of her sex. *Id.* at 978.

To survive summary judgment on this claim, Isaacs must come forward with evidence that would allow a reasonable fact finder to conclude that: (1) she was subject to unwelcome harassment; (2) the harassment was based on her sex; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and to create a hostile or abusive working environment; and (4) there is a basis for employer liability. *McPherson v. City of Waukegan*, 379 F.3d 430, 438 (7th Cir. 2004).

The following incidents are relevant to Isaacs' hostile workplace claim: 1) She glimpsed objectionable materials on computer screens two times; 2) she frequently heard comments over the radio in Stretchwrap about "dragging my wood," or "my wood's awful long" that she took to be sexual references; 3) Pebworth twice told her that her rear end was so big that two men could climb on it; and 4) Pebworth made crying sounds over the radio in an effort to mock her, used the word "bitch" in her presence a few times, and the term

"fucking bitch" twice in reference to someone other than Isaacs.[6]

First, the Court determines whether the incidents that can be linked to sex were sufficiently severe or pervasive to support a claim under Title VII. To be considered severe or pervasive, the conduct must have been objectively hostile or abusive, and the target also must have subjectively perceived it that way. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993). "[I]solated and innocuous incidents will not support a hostile environment claim." *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996). *See also Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533 (7th Cir. 1993) ("'relatively isolated' instances of misconduct that [are] not severe will not support a hostile environment claim"); *but see Cerros*, 398 F.3d at 951 ("pervasiveness and severity are, to a certain degree, inversely related; a sufficiently severe episode may occur as rarely as once, while a relentless pattern of lesser harassment that extends over a long period of time also violates the statute") (internal quotation omitted). The court must consider the totality of the relevant circumstances. *Harris*, 510 U.S. at 23; *Murray v. Chi. Transit Auth.*, 252 F.3d 880, 889 (7th Cir. 2001).

A fact finder could easily conclude that Isaacs subjectively perceived her work environment to be hostile and abusive.

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[6] *See* Isaacs Dep. at 502, 504, 506-09. Isaacs then contradicts her own deposition testimony via her sworn affidavit, in which she testifies that Pebworth called women "bitches" or "fucking bitches" on a "steady basis" and told Isaacs "fuck you bitch." *See* Isaacs Aff., ¶ 322. Isaacs' affidavit is so lacking in credibility as to be entitled to zero weight in summary judgment proceedings, as Isaacs has not given a plausible explanation for the discrepancy in the affidavit. *See Beckel v. Wal-Mart Assocs.*, 301 F.3d 621, 623 (7th Cir. 2002).

But to ascertain whether Isaacs' work environment was objectively hostile or abusive, the Court must consider all the circumstances, including the frequency of the discriminatory conduct; the severity of the conduct; whether the conduct was physically threatening and/or humiliating, or merely an offensive utterance; and whether that conduct unreasonably interfered with Isaacs' work performance. *See McPherson,* 379 F.3d at 438; *Wyninger,* 361 F.3d at 975-76. Indeed, the threshold for plaintiffs is high, as "[t]he workplace that is actionable is one that is 'hellish.'"[7] *Perry v. Harris Chernin, Inc.,* 126 F.3d 1010, 1013 (7th Cir. 1997).

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[7] Although hostile work environment claims do not require proof of tangible psychological injury, they require proof that goes beyond evidence of an uncomfortable or "merely offensive" work environment. *See Wyninger,* 361 F.3d at 977; *Cerros,* 288 F.3d at 1046. Still, the boundary between actionable harassment and less severe conduct is not a bright one:

> On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers. We spoke . . . of "the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing." It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other. . . .

*Hostetler v. Quality Dining, Inc.,* 218 F.3d 798, 807-09 (7th Cir. 2000) (internal citations omitted). The federal courts have struggled case by case.

The Court finds Isaacs' evidence insufficient to survive summary judgment on a hostile work environment claim. A hostile work environment claim requires proof that goes beyond evidence of an uncomfortable or unpleasant work environment. *See Wyninger,* 361 F.3d at 977. Title VII is not a "'general civility code' designed to purge the workplace of all boorish or even all harassing conduct." *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 808 (7th Cir. 2001) (citing *Oncale v. Sundowner Offshore Srvs, Inc.*, 523 U.S. 75, 81 (1998). In considering the factors outlined above, none weighs in Isaacs' favor. Although Isaacs testified that she the environment was so hostile that she was forced to take repeated stress leave, the Court finds that her assertion only supports her subjective opinion that the environment was inappropriately hostile. As noted above, she also must show that the environment was hostile under an objective standard as well.

Her co-workers' isolated comments, while rude and tactless, do not rise to the level of an actionable hostile work environment claim. The only allegation Isaacs makes as to repeated conduct (without specifying how often the conduct occurred), was that her co-workers made comments about "dragging my wood" and "my wood's awful long." The Seventh Circuit has repeatedly affirmed that occasional vulgar banter of coarse and boorish workers, even if tinged with sexual innuendo, is neither pervasive nor severe enough to be actionable. *See, e.g., Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 977 (7th Cir. 2004).

There is insufficient evidence that Pebworth making crying noises over the radio in an attempt to mock Isaacs are sex-based. *See Minor v. Ivy State Tech Coll.*, 174 F.3d 855, 858 (7th Cir. 1999) ("It is not enough that a supervisor or co-worker fails to treat an employee with sensitivity, tact, and

delicacy, uses coarse language, or is a boor. Such failures are too commonplace in today's America, regardless of the sex of the employee, to be classified as discriminatory"). Further, Isaacs does not set forth how often Pebworth mocked her in such a fashion.

Several allegations cited in Isaacs' response regarding Pebworth's comments about her and other females relate to comments that occurred outside her presence when she was on leave. Pl.'s Br. Resp. at 82 (citing Isaacs Dep. 128-43. *See Mason v. S. Ill. Univ. at Carbondale,* 233 F.3d 1036, 1046 (7th Cir. 2000) ("Behavior of which plaintiff is unaware, and thus never experiences, is not 'harassment' of the plaintiff (severe, pervasive, or other)"). In her deposition, Isaacs alleges only that Pebworth used the word "bitch" in her presence a few times, and the term "fucking bitch" twice in reference to someone other than Isaacs. *See Hildebrandt,* 347 F.3d at 1034-35 (noting that comments overheard by, but not directed at, the plaintiff do not have the same impact as harassment directed at her).

Even then, comments made by Pebworth in Isaacs' presence are not. *See Moser v. Indiana Dep't of Corr.,* 406 F.3d 895, 902-03 (7th Cir. 2005) (affirming summary judgment on Title VII hostile environment claim in favor of employer where plaintiff had alleged that co-worker's harassing remarks were "part of his daily, non-ceasing quest to degrade women" but court found no serious or threatening comments); *Racicot v. Wal-Mart Stores, Inc.,* 414 F.3d 675, 678 (7th Cir. 2005) (affirming summary judgment on Title VII hostile environment claim in favor of employer where co-workers' behavior was "more reflective of run of the mill uncouth behavior than an atmosphere permeated with discriminatory ridicule and insult").

Pervasive sexual and pornographic images in the workplace can create an actionable hostile environment. *See, e.g., Hostetler,* 218 F.3d at 807. However, to survive summary judgment on her sexual harassment claim, Isaacs also must show that Hill's was negligent in failing to discover the harassment or in its efforts to prevent further harassment. *See Mason v. So. Ill. Univ. At Carbondale,* 233 F. 3d 1036, 1043 (7th Cir. 2000). In hostile workplace cases, "the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000). The undisputed evidence shows that once Hill's learned of the problem involving sexual images on computers, it conducted an investigation, suspended eleven employees, and issued a warning to employees about inappropriate use of workplace computers and e-mail.

The Court has found the more overt sexually-based conduct to be insufficient to support a hostile work environment claim. Therefore, the remainder of the incidents alleged by plaintiff, where the sexual connection is far more attenuated (if not nonexistent), do not alter the Court's finding. While the Court may not view any incident in isolation, *see Cerros v. Steel Tech., Inc.*, 398 F.3d 944, 1046 (7th Cir. 2005) (reversing summary judgment for employer in racially hostile environment case where the district court failed to consider multiple incidents in their entirety), the fact that none of Isaacs' more overt sexually-based allegations are sufficiently severe or pervasive ultimately dooms her claim. While Isaacs' employment environment was riddled with conflict and inappropriate behavior, and while the Court does not condone the behavior of Isaacs co-workers, a reasonable fact-finder could not conclude that it was "hellish." *Perry,*

126 F.3d at 1013. Accordingly, Isaac's sexual harassment claim fails as a matter of law.

## E. RETALIATION

### 1. Union Activity

Isaacs' claim that Hill's retaliated against her for supporting unionization efforts at the Plant is pre-empted under the National Labor Relations Act ("NLRA"). Under the NLRA, it is an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. 29 U.S.C. § 158(a)(3). However, the NLRA "pre-empts state and federal court jurisdiction to remedy conduct that is protected or prohibited by the Act." *Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971). Therefore, Isaacs may not raise this claim in this proceeding. Isaacs concedes her retaliation claim for union activity and claims to have filed a complaint with the National Labor Relations Board. Pl.'s Br. Resp. at 96. Hill's is entitled to summary judgment on this claim.

### 2. Title VII and FMLA Retaliation

Title VII prohibits employers from punishing employees for complaining about discrimination or other practices that violate Title VII. 42 U.S.C. § 2000e-3(a); *Moser*, 406 F.3d at 903. Similarly, the FMLA prohibits employers from discriminating or retaliating against employees who exercise their rights under the Act, and from interfering with an employee's attempt to exercise those rights. 29 U.S.C. § 2615(a); *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004).

The Seventh Circuit uses the same standard to evaluate Title VII and FMLA retaliation claims. *Buie*, 366 F.3d at 503. Under the direct method of proof, Isaacs must present direct evidence of (1) a statutorily-protected activity; (2) an adverse action taken by Hill's; and (3) a causal connection between the two. *Rhodes*, 359 F.3d at 508; *Stone v. City of Indianapolis Pub. Util. Div.*, 281 F.3d 640, 644 (7th Cir. 2002). Under the indirect method, Isaacs must show that (1) she engaged in statutorily-protected activity; (2) she performed her job according to Hill's legitimate expectations; (3) despite her satisfactory performance, she suffered an adverse action by Hill's; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily-protected activity. *Id.* If Isaacs could establish *a prima facie* case under the indirect method, the burden would then shift to Hill's to articulate a legitimate, non-discriminatory reason for its actions. If Hill's could do so, the burden then would shift back to Isaacs to present evidence that could allow a reasonable jury to find that Hill's' stated reason was not a true reason, but a pretext, which might allow an inference of retaliatory intent. *Id.*

Isaacs contends that she relies on the direct and indirect methods of proof, and the Court considers whether she could succeed under either analysis. Many of the acts of which Isaacs complains in her sexual harassment Count — transfer, denial of training, ostracism by co-workers, refusal of help, being given a Formal Coaching, etc. — also are cited as forms of alleged unlawful retaliation.

Hill's raises three challenges to this Count. Specifically, Hill's asserts that 1) Isaacs' allegations do not amount to adverse employment actions; 2) under the direct method of proof, she has no proof of retaliatory animus on the part of any alleged decision-maker and cannot show a causal nexus

between any protected conduct on her part and an adverse action; and 3) under the indirect method of proof, Isaacs has not identified any similarly-situated employees. Isaacs' jumbled response appears to confuse the nature of Hill's' two latter challenges to her evidence, and as best as can be deciphered by the pleading, argues that she has evidence of a similarly-situated employee treated more favorably, showing a causal nexus between the protected conduct and the adverse actions.[8] Pl.'s Br. Resp. at 89.

The dispositive finding under this claim is that Isaacs completely fails to address Hill's' argument regarding whether any of Isaacs' complaints actually constitute adverse actions, a requirement under both the direct and indirect methods of proof. *See Rhodes,* 359 F.3d at 508. Isaacs only addresses the issue as follows:

> The defendants argue that plaintiff suffered no adverse action before she was placed in IIP in June and July 2002. The defendants then claim that plaintiff should have complained to the EEOC about retaliation before July 2002. The defendants have even argued that the IIP was not an adverse action, and it was an adverse action because of the reasons stated above. Therefore, the defendants' argument that plaintiff should have complained to the EEOC about retaliation before July 2002 is without basis.

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[8] The Court is therefore forced to parse her citations and determine what evidence she believes supports the similarly-situated prong under the indirect method and what evidence supports the causal nexus requirement under the direct method.

Pl.'s Br. Resp. at 88. Although Isaacs' statement can be interpreted to mean that being placed in IIP in June and July 2002 was an adverse action, she provides absolutely no citation to record evidence or applicable case law showing that such action constitutes a genuine adverse action for the purposes of her Title VII and FMLA retaliation claims, despite having filed a 96-page brief. It is the parties' duty to support their arguments properly, and it is not for the Court to search for a disputed issue of fact if there is a factual contention not adequately supported in the record by citation to admissible evidence. *Roger Whitmore's Automotive Services, Inc., v. Lake County,* 424 F.3d 659, 664 n. 2 (7th Cir. 2005). Failing to make any citation to record evidence in one's argument does not comport with this obligation. On this basis alone, Hill's' motion for summary judgment should be granted. *See Thomas v. Christ Hosp. and Med. Center,* 328 F.3d 890, 894 (7th Cir. 2003) (citing *Lujan v. Nat. Wildlife Fed.*, 497 U.S. 871, 888 (1990) (reiterating that "Rule 56(e) of the Federal Rules of Civil Procedure specifically prohibits a party from relying upon his allegations to contest entry of summary judgment."). However, assuming for the sake of argument that Isaacs' allegations constitute adverse actions, her claims still fail.

First, considering Hill's' challenge to the similarly-situated element under the indirect method of proof, Isaacs asserts that several employees were similarly situated and treated more favorably.[9] However, it is not clear whether anyone at Hill's was similarly situated to Isaacs under the

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[9] Included in Isaacs' list of similarly-situated employees were McConnell, Baker, Pebworth, Bill Monroe, Chasteen, Chris Penland, yet Isaacs only cited supporting evidence with regard to Steve Baker. *See* Pl.'s Br. Resp. at 89-90.

current Seventh Circuit definition of the term. "To meet her burden of demonstrating that another employee is 'similarly situated,' a plaintiff must show that there is someone who is directly comparable to her in all material respects." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). As Isaacs failed to present any evidence regarding these employees beyond the fact that she was allegedly disciplined and harassed and they were not, it is impossible to determine whether they were "similarly situated" to Isaacs under this standard. Accordingly, Isaacs has not raised an inference that a similarly-situated employee who has not complained of sexual harassment or taken FMLA leave was treated more favorably or that Hill's "applied its legitimate employment expectations in a disparate manner (i.e., applied expectations to similarly-situated [non-complaining or non-FMLA leave taking] employees in a more favorable manner)." *Peele v. Country Mut. Ins.* Co., 288 F.3d 319, 329 (7th Cir. 2002).

The Court next addresses Hill's' challenge to the causal nexus requirement under the direct method of proof.[10] First, the Seventh Circuit has observed that "it is clear that mere temporal proximity is not enough to establish a genuine issue of material fact." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 981 (7th Cir. 2004) (internal citation and quotation omitted). Isaacs asserts that Jenkins wrote a note to Isaacs'

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[10] Isaacs makes a number of assertions about co-worker and management behavior without citation to record evidence. The Court will disregard those unsupported statements. While it is the Court's responsibility to determine if genuine issues of material fact exist, "[t]he parties . . . bear a cocomitant burden to identify the evidence that will facilitate this assessment." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). *See also United States v. Dunkel*, 927 F.3d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.") *(per curiam)*.

new Area Leader to extend Isaacs' IIP. Although she may speculate or theorize about management's motivation in writing the letter, such theorizing is patently insufficient to allow her claims to survive summary judgment. *See, e.g., Buie,* 366 F.3d at 503 (setting forth evidence required to prove retaliation claims and recognizing that FMLA and Title VII retaliation claims are similarly evaluated).

Second, many of Isaacs' alleged complaints are not even specified in time. *See, e.g.,* Pl.'s Br. Resp. at 90 ("Male employee [Pebworth] had already said that he was going to get Isaacs. . . Tony Brown had also told Isaacs that Jenkins had previously said that he was not putting up with Isaacs. . . Donna Moore saw so much animosity towards Isaacs that she wrote a letter to management stating that Isaacs should not be placed back in Stretchwrap because of the animosity. . .") (citing Isaacs Aff. 280, 297, 299). From Isaacs' filing and citations, it is impossible to tell whether these events occurred during the 300-day window covered by her second EEOC Charge.

Third, Isaacs' allegations regarding the actions of her co-workers cannot form the basis of her retaliation claims. Isaacs asserts that 1) a co-worker told her that he did not want her on his team because she had sued the company; 2) another co-worker told Isaacs that ever since she filed charges he had not been able to say a word to her (unnecessary expletives removed); and 3) a third co-worker grabbed Isaacs' ears with his dirty hands, twisted her ears forward so that her head went down, and said to "write that in your little book." *See* Pl.'s Br. Resp. at 90-91.

"Retaliatory harassment by co-workers or a supervisor can rise to this level if it is severe enough to cause a significant change in the plaintiff's employment status."

*Stutler v. Ill. Dep't of Corr.*, 263 F.3d 698, 703 (7th Cir. 2001). There are three basic categories of cases where courts have found the criteria for materially adverse employment actions to be met: (1) cases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished, including termination; (2) cases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects by preventing her from using her skills and experience, so that the skills are likely to atrophy and her career is likely to be stunted; and (3) cases in which the employee is not moved to a different job or the skill requirements of her present job altered, but the conditions in which she works are changed in a way that subjects her to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in her workplace environment. *O'Neal*, 392 F.3d at 911. However, Isaacs has not so much as attempted to make such a showing. Merely citing a litany of actions she believes to be adverse, Isaacs does not assert that any of such conduct materially altered her compensation or other financial benefits, her job responsibilities, or her career prospects. Nor has she supported the notion that these actions altered the conditions of her work environment or her employment status in a significantly negative way.

Finally, while the record is replete with incidents of Isaacs involving co-worker conflict, such as her assertions that 1) Jenkins made a fist at Isaacs when she was walking down an aisle way, 2) Technician Dan Brouse ("Brouse") made a "blowfish face," and 3) Technician Scott Vance ("Vance")

acted like he was going to hit or kick Isaacs.[11] First, Isaacs does not present any evidence from which the Court can infer that these actions by her co-workers were taken against her because of her protected conduct. The mere fact that something allegedly happened to her after she engaged in protected activity is insufficient to establish retaliation. *See, e.g., Wyninger,* 361 F.3d at 981 ("[I]t is clear that mere temporal proximity is insufficient to establish retaliation"). In addition, while a "wide variety of actions" can qualify as materially adverse, "not everything that makes an employee unhappy is an actionable adverse action." *Haugerud v. Amery School Dist.,* 259 F.3d 678, 691 (7th Cir. 2001) (internal quotation omitted). Furthermore, "offhand comments and isolated incidents," unless extremely serious, could not reasonably be believed to violate Title VII, and complaints based upon them are not protected. *Mattson v. Caterpillar, Inc.,* 359 F.3d 885, 891 (7th Cir. 2004) (quotation omitted). The Court cannot conclude that any of these behaviors, inappropriate as they may be, constitutes adverse actions.

Accordingly, Hill's is entitled to summary judgment on Isaacs' Title VII and FMLA retaliation claims.

## F. SUBSTANTIVE FMLA CLAIM

The burden of proof on a claim brought under the substantive rights provision of the FMLA lies with Isaacs, who must demonstrate by a preponderance of the evidence her eligibility for and her entitlement to the disputed leave. *Diaz*

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[11] Isaacs also asserts that male employees were using vulgar language and talking about visiting a pornographic website. *See* Pl.'s Br. Resp. at 91. However, such an allegation has no bearing on her Title VII and FMLA retaliation claims.

*v. Fort Wayne Foundary Corp.*, 131 F.3d 711, 713 (7th Cir. 1997); *Haefling v. United Parcel Service, Inc.*, 169 F.3d 494, 499 (7th Cir. 2001). The FMLA gives eligible employees the right to twelve work-weeks of unpaid leave during any twelve-month period for specified reasons.

Hill's asserts that it has provided Isaacs far more leave than the FMLA provides, Vanderpool Aff. ¶¶ 17-22, and during her five years of employment, she has taken two years off, much of which was treated as paid FMLA leave. *See* Def.'s Mot. at 53; Def.'s Br. Rep. at 39. Isaacs does not respond to this assertion. Instead, Isaacs appears to confuse her substantive FMLA claim with that of her FMLA retaliation claim, and presents argument regarding the latter. She does not allege that she was actually denied any leave nor that Hill's failed to reinstate her pursuant to the requirements of the FMLA. Isaacs has failed to present evidence, or even argue, that she has been denied FMLA leave to which she was entitled. Absent a cogent argument that she was entitled to FMLA leave, Isaacs cannot defeat summary judgment on the issue. *See, e.g., Kramer v. Banc of America Securities, LLC,* 355 F.3d 961, 964 n.1 (7th Cir. 2004) (perfunctory and undeveloped arguments that are unsupported by pertinent authority, are waived; *Border v. City of Crystal Lake*, 75 F.3d 270, 274 (7th Cir. 1996) (perfunctory and undeveloped arguments are waived).

In another section of her response, Isaacs asserts that she was denied FMLA leave when her grandchild was born. *See* Pl.'s Statement of Disputed Fact 102 ("Isaacs was denied FMLA leave when her daughter gave birth to Isaacs' grandson, and Isaacs had to use vacation days.") However, as indicated above, the burden is on the plaintiff to show her eligibility and entitlement to leave. Isaacs does not indicate what, if any, specified reason under the FMLA is satisfied by

the birth of a grandchild. *See Cool v. Borgwarner Diversified Transmission Prods.*, Inc., 2004 U.S. Dist. Lexis 570, *12-13, 2004 WL 253252, *4-5 (S.D. Ind. Jan. 12, 2004); *Compare Haefling v. United parcel Srvs., Inc.*, 169 F.3d 494, 499 (7th Cir. 2001) ("where an illness or injury constitutes a 'serious health condition' under the FMLA is a legal question that an employee may not sidestep in the context of summary judgment merely by alleging [her] condition to be so."). Accordingly, Hill's is entitled to summary judgment on Isaacs' FMLA entitlement claim.

## G. REMAINING STATE RETALIATION CLAIM

One exception to Indiana's general rule of employment at will is that "an employee who has been discharged in retaliation for filing a claim of workers' compensation may recover damages for wrongful termination." *See Mack v. Grate Dane Trailers*, 308 F.3d 776, 784 (7th Cir. 2002) (citing *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973)). As the Court grants summary judgment in favor of Hill's as to each of Isaacs' federal claims, the Court **REMANDS** Isaacs' worker's compensation retaliation claim, under Indiana Code § 22-3-2-15, to state court.

## V. CONCLUSION

For the reasons stated above, Defendants', Colgate-Palmolive Company, and Hill's Pet Nutrition, Inc., Motion for Summary Judgment is **GRANTED** in its entirety. Court declines to exercise supplemental exercise jurisdiction over, and **DISMISSES without prejudice,** Plaintiff's, Carol L. Isaacs, remaining state law claim. Additionally, Defendant's Motion to Strike is **GRANTED,** the Court **STRIKES** the affidavits of Dewey Lakes, Larry Sheets, Teressa Toney, and

Elizabeth Bright, and shall **DISREGARD** all statements in Plaintiff's affidavit that are based on those submissions.

IT IS SO ORDERED this 31st day of March, 2006.

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court Southern
District of Indiana

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

**No. 1:03-cv-348-LJM-VSS**

**[Filed March 31, 2007]**

| | |
|---|---|
| CAROL L. ISAACS, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| COLGATE-PALMOLIVE COMPANY | ) |
| and HILL'S PET NUTRITION, INC., | ) |
| Defendants. | ) |
| | ) |

**ENTRY OF JUDGMENT**

Through an order dated March 31, 2006, this Court granted summary judgment in favor of the defendants, Colgate-Palmolive Company, and Hill's Pet Nutrition, Inc. (otherwise known as Hill's Pet Nutrition Indiana, Inc.), and against the plaintiff, Carol L. Isaacs. The Court declined to exercise supplemental jurisdiction over a remaining state law claim. Plaintiff shall take nothing by way of her complaint.

DATED this 31st day of March, 2006.

LARRY McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

LAURA A. BRIGGS, CLERK
United States District Court
Southern District of Indiana

By: Deputy Clerk